No. 2236

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. M. COBBAN, E. B. WEIRICK, INDIVIDUALLY AND ALSO AS TRUSTEE AND THE PAYETTE LUMBER AND MANUFACTURING COMPANY, A CORPORATION, APPELLANTS,

VS.

MOLLIE CONKLIN, APPELLEE.

BRIEF OF APPELLANTS

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Appellant,
Residence, Boise, Idaho.

BYNS - YORK CO., PTRS. & BDRS.

Records of U.S. Circuit
Court of Appeals
702

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. M. COBBAN, E. B. WEIRICK, INDIVIDUALLY AND ALSO AS TRUSTEE AND THE PAYETTE LUMBER AND MANUFACTURING COMPANY, A CORPORATION, APPELLANTS,

vs.

MOLLIE CONKLIN, APPELLEE.

STATEMENT OF THE CASE.

This suit was brought by appellee on September 7th, 1905, for the cancellation of certain deeds and powers of attorney alleged to be fraudulent and forged and to constitute a cloud upon appellee's title to approximately three thousand seven hundred and twenty-three acres of timber lands situated on the upper Payette River in Boise County, Idaho. The appellant, Payette Lumber & Manufacturing Company has held the record title to the lands referred to since May 19th, 1903, holding title under a warranty deed from appellant E. B. Weirick, Trustee, who in turn deraigned title through deeds of warranty dated and recorded in the month of September, 1901, from appellee, executed by the appellant R. M. Cobban as her attorney in fact.

An amended bill was filed April 15th, 1908. The evidence was taken in 1910 and the cause submitted to the Court in

1912. About the time appellee filed her bill the United States also filed a bill claiming title to the lands described in appellee's bill. The bill of the Government being directed against appellants and John A. Benson and Joseph C. Campbell. The two cases were consolidated and tried together, and this accounts for the reference to Campbell and Benson in several places in the record as defendants. It is important to note, however, that Campbell and Benson were not parties to the suit brought by appellee. The bill of the Government was dismissed on the authority of the decision of this Court in United States vs. Conklin, 177 Fed. 155.

The District Court held that the allegations of fraud and conspiracy charged in appellee's bill were wholly unwarranted and that "there is no basis for a suspicion even" of any fraud, but the Court held that the conveyances by appellant Cobban as attorney in fact of appellee, to Weirick, were unauthorized and void and it entered a decree cancelling the powers of attorney under which Cobban made the conveyances and cancelled the deeds from appellee to Weirick and from Weirick to the Payette Lumber & Manufacturing Company.

The Court also held that it would be inequitable to allow appellee to recover property worth, through the efforts of appellants, a great deal more than appellee claimed was due her under her contract with Benson through whom the sales were made to appellants, and the Court further held that appellants, who were at least innocent in fact, should be entitled to a conveyance from appellee upon paying to her the amount due her from Benson, to-wit: $10,130.38, with interest, and that upon the failure of appellants to pay such sum within the time fixed the title would be quieted in appellee.

The facts stated more in detail are substantially as follows:

Some time prior to the year 1900 appellee's husband, now deceased, had acquired title to approximately nine thousand six hundred acres of land in Inyo and Tulare counties, California. These lands are generally referred to in the record as the "Monache lands." For legal services in connection with the title to these lands Mr. Conklin conveyed an undivided one-half interest to Patrick Reddy, his brother-in-law, who was a member of the firm of Reddy, Campbell & Metson of San Francisco. The lands were included in the Sierra Forest Reserve and under the act of Congress of June 4, 1897, (30 Stats. 36) could by the owners be conveyed to the government and an equal area of public lands outside the forest reserve selected in lieu thereof, the lands selected being generally known as "lieu lands," and the lands in the forest reserve conveyed to the government being generally known as the "base lands" or the "base."

Under the regulations of the Land Department the patents to the lieu lands were issued to the grantor of the base lands (Trans. 495) and the selection of lieu lands had to be made in the name of the grantor, either by himself personally or by his attorney in fact.

The right to select lands in lieu of lands situated in forest reserves and conveyed to the government under the said act of Congress constituted what is commonly known as "Forest Reserve Lieu Land Scrip" and in the record here frequently referred to as simply scrip. The record shows that the general custom (Trans. 262) was for the owner of land in forest reserve to convey the same to the government and to sell the right to select lieu lands instead of making such selections himself. In selling such selection right or scrip the purchaser was furnished an abstract of title to the "base lands" showing that the title thereto had been conveyed to the government free and clear of encumbrances.

He was also furnished a power of attorney to select lands in lieu of the base lands, and a power of attorney to convey the lands selected. In such cases the seller of the scrip —the former owner of the base land—had no interest in the kind or character of land that the purchaser would select, and the custom developed of issuing the power of attorney to select and the power of attorney to convey the lands selected, in blank. That is to say, the name of the attorney in fact was not inserted by the seller, neither did the seller insert the description of the lands to be selected or conveyed under such powers of attorney, but such matters were left wholly to the discretion of the purchaser of the scrip, who was in fact the only person interested in the selection.

Mr. R. M. Cobban, one of the appellants, who was himself an extensive purchaser of scrip, testifies, and his evidence is uncontradicted, that it was the universal custom so far as he knew, to purchase such scrip in blank and that it was not practicable to handle the matter in any other way, and he had personally purchased and handled some two hundred selections in that manner, and he knew that the same method was being pursued by many other large investors in such scrip (Trans. 262).

Mr. Conklin died some time prior to 1900 and his estate had been distributed to appellee prior to the negotiations hereinafter mentioned. Patrick Reddy died in the spring of 1900 and his estate was in process of administration at the time the scrip which was laid on the land in question, was purchased.

John A. Benson, a scrip dealer and land attorney of San Francisco and a friend and client of Patrick Reddy, had discussed with the latter the sale of the Monache lands and the conveyance thereof to the government for lieu land

scrip, but the negotiations were cut off by the sudden death of Mr. Reddy (Trans. 379, 380).

Joseph C. Campbell of Campbell, Metson & Campbell, was attorney for the Reddy estate and his firm had previously been attorneys for the Conklin estate. Through Campbell's instrumentality meetings were held in his office between Mr. Benson and representatives of the Reddy estate and appellee and her son, N. E. Conklin. The conflict in the evidence as to the terms of the agreement reached as to the sale of the Monache lands and numerous details connected with carrying it out, is easily understandable when it is considered that ten years had elapsed between the making of the agreement and the time this evidence was taken. The essential points, however, are reasonably clear.

Lieu land scrip at that time had a market value of about $4.00 per acre and Benson was to receive 20c an acre for selling the land or the scrip and for preparing the necessary papers and looking after all details connected with the conversion of the base lands into scrip and the sale of the scrip, giving appellee and her co-owner $3.80 per acre net over and above all expenses. Several meetings seem to have been held in the summer of 1900 in Mr. Campbell's office between Benson, Campbell, the representatives of the Reddy estate and appellee and her son, N. E. Conklin, who is an attorney at law and assisted his mother in the negotiations.

It is clear from the evidence that appellee and her son were present at the last meeting held in the month of August, 1900. It is clear also that the negotiations with Benson had been carried on by appellee and her son before that meeting, for on July 11, 1900, N. E. Conklin turned over to Benson the map and patents covering the Monache lands for the purpose of enabling Benson to check up the description and examine the title and prepare the necessary deeds conveying the lands to the government (Complainant's Ex-

hibit "W," Trans. 467), thus clearly proving that appellee and her son were fully aware of the proposed exchange of the base lands.

Benson testifies positively that he and Mr. Conklin discussed fully the form of deed to the United States and the other papers that would be required to clear the title to the land, and that while the descriptions were being checked over and the deeds prepared, a period of several days or weeks, Mr. Conklin was a frequent visitor at Mr. Benson's office (Trans. 387, 389, 390, 419, 440). Mr. Benson first thought these meetings were after the meeting in August held in Mr. Campbell's office at which all parties were present and the final agreement arrived at, but he later corrected his testimony on this point and stated that the conferences in his office with Mr. Conklin over the form of the papers and the matters required to clear the title were before the final meeting in Mr. Campbell's office (Trans. 420, 436, 440, 442, 452 and 453). In this he is strongly corroborated by J. H. Laveson (Trans. 365, 366) and Miss Glover, the clerks who assisted Mr. Conklin in checking over the description and preparing the deeds (Trans. 370, 372, 374), and by the fact that the papers were explained to the notary, Holland Smith, at the interview in August when all parties were present (Trans. 440).

Appellee testified that she thought that the lands were to be deeded directly to Benson and that she did not know when she signed the deeds that she was conveying the lands to the government, but the evidence shows clearly and the trial court so held, that the agreement between the parties was that the owners of the Monache lands should deed them to the government and that Benson would sell the right to select lieu lands in accordance with the usual practice of selling forest reserve lieu land scrip.

The trial court found that this agreement contemplated that the title papers, when executed, should be deposited in the Anglo Californian Bank in escrow, and withdrawn as Benson paid the agreed price (Trans. 512, 513), but no such deposit was made (Complainant's Exhibit "S").

The trial court in this matter, however, entirely overlooked the importance of the evidence as to the act of June 6th, 1900, which became effective October 1st, 1900, limiting the right of lieu land selections to surveyed land (Trans. 391, 392). Under this act the scrip could only be used on surveyed land unless the base lands were conveyed to the government before October 1st, 1900, and this could not be done if the papers were simply placed in escrow. Benson's testimony that the papers were not to be placed in escrow is strongly corroborated by the surrounding circumstances and we think it is clear from the evidence that it was the purpose of all parties to expedite the matter of executing the deeds to the government so that they could be recorded prior to October 1st, 1900, thereby saving a valuable right to the owners and adding to the value or salableness of the scrip.

There is some dispute as to the precise relation in which Campbell stood to appellee. She claims that he was her attorney, but the court held that while he was not strictly her attorney he nevertheless stood in some sort of fiduciary relation to her (Trans. 500). Campbell, on the other hand, denies that he acted in these transactions in any capacity other than as attorney for the Reddy estate.

Benson, with the assistance of N. E. Conklin, prepared the deeds conveying the Monache lands to the United States, also the applications to select with the descriptions in blank, and the powers of attorney to select in case the original selections failed, also the powers of attorney to convey the selected lands, with the name and address of the attorney-in-fact

in blank. These powers of attorney were of a printed form apparently especially prepared by Mr. Benson for use in his scrip business. Many of the originals were introduced in evidence and have by the court been certified to this court for use upon the appeal.

These papers when ready for execution, were sent by Mr. Benson's office to Mr. Campbell's office for execution by the representatives of the Reddy estate and by appellee. A messenger from Mr. Campbell's office took the papers to the residence of the parties who were to execute them. Appellee claims that she signed the papers without examining more than a few of them and those that she examined were deeds, and she thereupon assumed that all the papers were deeds and that they were proper for her to execute, because she understood they had been sent to her from Mr. Campbell's office. She claims the acknowledgments were false and that she did not acknowledge any of them before a notary public or other officer. The court held that the truth or falsity of the acknowledgment was immaterial in this suit, as appellee had ratified the deeds to the government by bringing this suit to recover the lieu lands patented to her in lieu of the base lands, and that the only question in this case was as to the validity of the powers of attorney to convey the selected lands and the validity of the conveyances made under such powers of attorney. Appellee testified that the papers, after being signed by her, were delivered to a messenger, presumably from Campbell's office, but the papers eventually came into the possession of Benson, who it is conceded had full control over them at all times. There was no written agreement between the parties.

Appellant Cobban, a resident of Missoula, Montana, and appellant Weirick of Butte, and certain associates not parties to this suit residing in that vicinity, formed a syndicate about 1900 or 1901 for the purpose of acquiring timber

lands through the purchase of scrip. Neither Cobban nor any of his associates personally knew Benson, Campbell, the Conklins, or the Reddys (Trans. 496), but Mr. Cobban learned in some way that Mr. Benson had scrip for sale and he communicated with him by mail and wire for the purchase of several lots of scrip. The scrip so purchased from Benson included 3,729.52 acres of the Monache base lands which had been conveyed to the government by appellee. This scrip was purchased by Cobban at the market price of $4.00 per acre.

The procedure was as follows: Cobban would wire or write for the amount of scrip required, then Benson would forward to some bank in Boise or Butte the papers required, consisting of a deed, which had been duly recorded, conveying the base land to the United States, an abstract showing clear title to the base land in the United States, an application to select undescribed lands, an irrevocable power of attorney to convey such lands and supplemental powers of attorney to select if the first selection failed. After an examination of the abstract by Cobban, or his representative, he would pay the money to the bank, take all the papers, fill in the application to select with a description of the desired lieu lands and file it with the deed and abstract in the Boise Land Office; and at the same time, or subsequently, he would insert or cause to be inserted his own name as attorney in fact in the power of attorney to convey the selected land (Trans. 259-261-270).

At this point it is important to note that Cobban testified squarely that he had received a large number of powers of attorney with his name and address printed therein, authorizing him to post notice, etc., which were signed by Mollie Conklin and the Reddys, and sent him by Benson subsequently to his original purchase of the scrip (Trans. 278, 279).

These selections were made in the spring of 1901 (Trans. 252), and patents were issued in August or September, 1902 (Trans. 158), and about the time that patents issued Cobban conveyed by warranty deed the parcels so patented to E. B. Weirick, Trustee (Trans. 253, 498).

The members of the syndicate for whom Weirick acted as trustee are enumerated at page 244.

Later, appellants, Weirick and Cobban, acting for the syndicate, gave an option to Mr. Musser or Mr. Deary, which was later assigned to the Payette Lumber & Manufacturing Company (Trans. 254). On the 19th of May, 1903, the lands involved in the suit were conveyed by warranty deed from Weirick to the Payette Lumber & Manufacturing Company (Defendants' Exhibit "A"). On January 3rd, 1903, some five months before the deed to appellant Payette Lumber & Manufacturing Company, was made, but about a year and a half after the lands had been deeded to Weirick, appellee executed what purported to be a general revocation of all powers of attorney previously executed by her and this was recorded in Boise County, Idaho, where the lands in question are situated, on January 16th, 1903 (Complainant's Exhibit "T"). This revocation is general in form and specifies in particular only a power of attorney given to one C. L. Hovey, and makes no reference to Cobban or powers of attorney standing in his name.

The evidence is perfectly clear that for some time prior to the execution and recording of this revocation appellee and her general agent and attorney, Mr. N. E. Conklin, knew that Cobban had selected lands in Boise County in lieu of the Monache lands, and held powers of attorney to convey these lands.

Mr. Conklin began investigating the Monache transactions in December, 1901, and in July, 1902, he was sent a list by an attorney in Washington of the lieu lands selected

in his mother's name and the names of the persons who held powers of attorney for her (Trans. 214, 215, 238). His testimony is somewhat confused as to whether he actually knew that Cobban had powers of attorney to convey lands in Idaho before October, 1903, but on the whole the evidence shows such knowledge (Trans. 225, 226). Furthermore these powers of attorney were recorded in Boise County, Idaho, in the year 1901 and he knew that large tracts of lieu lands had been selected in that county. He made no attempt to find out anything about these powers until late in 1903 when he secured certified copies of the Cobban powers of attorney (Trans. 226). The evidence clearly shows both actual and constructive notice by appellee that Cobban held powers of attorney to convey the Idaho lands at the time this purported revocation was recorded.

It is conceded that Cobban and his associates paid in cash at the time of the delivery to Cobban of the Monache scrip the full purchase price of $4.00 per acre, and that Benson paid appellee only $2,750.00 as her share, while he paid the Reddy estate over $13,000.00, making an aggregate payment by Benson to the Reddy estate and appellee of about $15,900.00 (Trans. 392, 395, 423).

Some of these payments were made by Benson before and some after Cobban purchased. The reason why more was paid to the Reddy estate than to appellee appears to be due to the fact that the representatives of the Reddy estate were endeavoring to carry out their part of the transactions with Benson while appellee and her son were placing numerous obstacles in the way of approving the title to the base lands by the Land Department, thereby delaying the issuance of patent on the new scrip selections, all of which caused expense and embarrassment to Benson, and appellee also notified Benson in April, 1903, (Trans. 484, Exhibit

"U-I") that she would accept no more money on the transaction.

The District Court found that the charges of fraud and conspiracy against appellants were absolutely groundless and that they were innocent in fact, but it held that the powers of attorney and deeds should be cancelled because Cobban had no authority to insert his own name in the powers of attorney and then convey as the attorney in fact of appellee, and that Campbell was in a position analogous to that of an escrow holder and that the delivery by him of the deeds and papers to Benson, except through the Anglo California Bank, was in violation of appellee's instructions and rendered the instruments void or ineffectual for transferring title from appellee to appellants, even though appellants Weirick and the Payette Lumber & Manufacturing Company are in fact innocent purchasers for value, purchasing without knowledge of the assumed secret limitations on Campbell's and Benson's authority in the premises.

Appellee urged the same questions in this Court in United States v. Conklin, 177 Fed. 55, and before the Supreme Court of California in Conklin v. Benson, 159 Cal. 789, 116 Pac. 34, and both courts on substantially the same record and the same evidence now before the Court, held adversely to appellee's contentions.

SPECIFICATION OF ERRORS.

Appellants assign the following errors on this appeal:

That appellee did not show that appellants, or any or either of them, were guilty of any fraud or wrongdoing in purchasing or acquiring the land in the State of Idaho, which appellee sought to recover in her bill of complaint, or in purchasing or acquiring the scrip, deeds or

powers of attorney under which or through which appellants, or either of them, claim title to said land. And appellee failed to show any collusion, confederation or conspiracy between these appellants, or either of them, and any other person or persons whomsoever for the purpose of acquiring title to said lands or defrauding appellee thereof.

2. That appellee had been guilty of laches and was not entitled to equitable relief, or any relief, in said suit.

3. That the appellant, Payette Lumber & Manufacturing Company, was a *bona fide* purchaser for a valuable consideration, without notice of any claim of appellee.

4. That the appellants, R. M. Cobban and E. B. Weirick, individually and as Trustee, were the *bona fide* purchasers, in good faith, for a valuable consideration of all the right, title and interest of appellee in the California lands, known as the "Monache" lands, and of the lands in the State of Idaho which appellee in her bill of complaint seeks to recover in this suit.

5. That if any wrong, injury or damage has been sustained by appellee under the record in this cause, it was due to her own laches, carelessness and negligence, and not through any fault or wrongful act of these appellants, or any or either of them.

6. That the decree and the relief granted appellee is not within the issues framed by the pleadings, and is not sustained by the record, and is inequitable and unjust to these appellants.

7. That the District Court erred in ordering, adjudging and decreeing that the powers of attorney from appellee, Mollie Conklin, and described in her amended bill of complaint and in said decree, appointing the appellant R. M. Cobban as attorney in fact for said appellee be annulled, cancelled and declared utterly void and of no effect.

8. That the District Court erred in ordering, adjudging and decreeing that all warranty deeds purporting to have been executed for and on behalf of appellee by the appellant R. M. Cobban, as her attorney in fact, be annulled, cancelled and declared to be utterly void and of no effect.

9. Because the District Court erred in ordering, adjudging and decreeing that the warranty deed dated May 19, 1903, from appellant Weirick, as Trustee, to the appellant Payette Lumber & Manufacturing Company be cancelled, annulled and declared void and of no effect.

10. That the District Court erred in decreeing that these appellants, or either of them, had no right, title or interest in the lands described in the decree and situated in the State of Idaho.

11. That the District Court erred in adjudging and decreeing that these appellants should pay to appellee the sum of Ten Thousand One Hundred Thirty and 38-100 Dollars ($10,130.38), with interest at seven per cent (7%) per annum, and costs of suit before they would be entitled to hold or enjoy the lands described in the decree.

12. That the District Court erred in its decision in holding and concluding that appellee did not acknowledge before a notary public the instruments through which appellants deraign title to the land in question.

13. That the District Court erred in its decision in holding and concluding that there was no evidence in the record to support the theory that appellee ever authorized or ratified the delivery of any power of attorney to "convey," without the prior payment to her of the full purchase price agreed upon.

14. That the District Court erred in its decision in holding and concluding that appellee neither expressly nor impliedly authorized the delivery to Benson of the instruments

executed by her for the purpose of conveying the said Monache Lands, or lands selected in lieu thereof.

15. That the District Court erred in its decision in holding and concluding that the delivery of the instruments executed by appellee was not in accordance with the authorization or consent of appellee or anyone authorized to act for her.

16. That the District Court erred in its decision in holding and concluding that appellee did not know and had no reason to suspect that the powers of attorney in question had been delivered to Benson until after the sale to these appellants had been consummated, and that she acted with reasonable diligence in apprising appellants of her repudiation of the acts of Benson and others acting for her in delivering said instruments.

17. That the District Court erred in its decision in holding and concluding that the revocation of the powers of attorney, filed January 16, 1903, in any way affected the rights of these appellants.

18. That the District Court erred in its decision in holding and concluding that appellee had neither expressly nor impliedly ratified the delivery of the instruments, through which appellants deraign title, or proclaimed in a proper manner with reasonable diligence her unwillingness to be bound thereby.

19. That the District Court erred in its decision in holding and concluding that appellee would have accepted payment for the lands in question, or the so-called Monache lands, at $1.90 per acre for her undivided one-half interest from the said Benson during the years 1901 and 1902.

20. That the District Court erred in its decision in holding and concluding that the course pursued by appellee in her dealings with Benson and Campbell, and in other matters leading up to the commencement of this suit, was not

such as to debar appellee from seeking relief in a court of equity.

21. That the District Court erred in its decision in holding and concluding that neither of these appellants are protected under the rule, that where one of two innocent persons must bear the loss due to the injurious act of another, he must sustain the loss who has put it within the power of such other person to do the wrong.

22. That the District Court erred in its decision in holding and concluding that the power of attorney delivered to appellant Cobban, and executed by appellee, did not operate to confer upon said appellant the power to convey the land in question.

23. That the District Court erred in its decision in holding and concluding that the appellant Cobban did not, under the facts and circumstances disclosed by the record in this case, have authority to insert his name in the powers of attorney executed by appellee.

24. That the District Court erred in its decision in holding and concluding that the payments by appellant Cobban and his associates to Benson are in no way binding upon appellee, and that said Benson was not the agent of appellee.

25. That the District Court erred in its decision in holding and concluding that the said Benson was as much the agent of the appellant Cobban as of the appellee.

26. That the District Court erred in its decision in holding and concluding that the instruments executed by appellee and delivered to the appellant Cobban and his associates by Benson upon payment of the stipulated purchase price, and through which title is deraigned by these appellants to the lands in question, were inoperative for any reason.

27. That the District Court erred in its decision in holding and concluding that Benson was to receive possession

of the deeds and instruments in question only after he had paid in full the purchase price, and that these appellants were bound to know such fact and to know that said instruments had not been delivered by appellee, either in accordance with her agreement with Benson and Campbell, or otherwise.

28. That the District Court erred in its decision in holding and concluding that Campbell was the attorney or agent of appellee for any purpose.

29. That the District Court erred in its decision in holding and concluding that in purchasing the scrip in question appellants did not exercise due or proper care and caution.

30. That the District Court erred in its decision in holding and concluding that the universal custom, in handling scrip of the kind in question, of permitting the purchaser to insert in the powers of attorney to select and to convey the name of an agent of his own selection, would not operate to protect these appellants in the purchase of the scrip in question.

31. That the District Court erred in its decision in holding and concluding that the fact that the Reddy estate owned the other undivided one-half interest in the lands in question, would in any way or for any purpose put these appellants, or either of them, on notice of any of the fraudulent acts alleged to have been committed against appellee, or that the instruments executed by her had been executed unwittingly or unintentionally, and had not intentionally been delivered by appellee.

POINTS AND AUTHORITIES.

Where a bill in equity sets up actual fraud and makes that the ground of the prayer for relief, the complainant will not be entitled to a decree if he fails to prove the fraud but establishes other facts incidentally alleged, which might

of themselves create a cause of action under a totally distinct head of equity.

16 Cyc. 486.
Eyre v. Potter, 15 How. 42, 56; 14 L. Ed. 592.
Price v. Berrington, 3 Mac. & G. 486, 42 Eng. Rep 348.
Curson v. Belworthy, 3 H. L. C. 742, 10 Eng. Rep. 294.
Ferraby v. Hobson, 2 Phill. (22 Eng. Chanc. Rep.) 255.
Montesquieu v. Sandys, 18 Ves. Jr., 313.
Powys v. Mansfield, 6 Sim. 565.
Hoyt v. Hoyt, 27 N. J. Eq. 399.
Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

This rule is not an arbitrary and technical rule of pleading, but is based primarily on the principle that parties who impute fraud, dishonesty, and corruption to their opponents assume a great responsibility and ought to be required to sustain these allegations by their proof, or lose their right to relief.

Wilde v. Gibson, 1 H. L. C. 604, 9 Eng. Rep. 697.
Glascott v. Lang, 2 Phill. (22 Eng. Chanc. Rep.) 310.
Tillinghast v. Champlin, *supra.*
Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed. 334.
Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801.
Nichols v. Rosenfeld, 181 Mass. 525, 63 N. E. 1063.

The allegations and the proof must correspond and the relief given must be according to both.

Beach, Modern Equity Prc. Sec. 99.
Wilde v. Gibson, *Supra.*
Doggett v. Simms, 79 Ga. 253, 4 S. E. 909.

Hendryx v. Perkins, *supra.*

The theory on which the bill of complaint is based can not be changed after the trial and argument, because to do so would deprive defendants of the opportunity to make their defense.

16 Cyc. 485.
Rejall v. Greenhood, 35 C. C. A. 97, 92 Fed. 945.
Tillinghast v. Champlin, *supra.*
Wilde v. Gibson, *supra.*

The Federal Courts are unanimous in denying relief to parties who found their bill on fraud and, having failed to prove fraud, seek relief on other grounds.

Eyre v. Potter, 15 How. 42, 56; 14 L. Ed. 592.
Putnam v. Day, 22 Wall. 60, 66; 22 L. Ed. 764.
C. B. & Q. R. Co. v. Babcock, 204 U. S. 585, 593; 51 L. Ed. 638.
French v. Shoemaker, 14 Wall. 314, 335, 20 L. Ed. 852.
Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed. 434.
Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801.
Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209.
Spies v. C. & E. Ry Co., 40 Fed. 34, 6 L. R. A. 565.
Fisher v. Boody, 1 Curt, 206, Fed. Cas. No. 4814.
Britton v. Brewster, 2 Fed. 160.
Badger v. Badger, Fed. Cas. No. 718.
Bradley v. Converse, Fed. Cas. No. 1775.

The same rule obtains in numerous state courts, especially in those states where the distinction between law and equity is still maintained.

Mt. Vernon Bank v. Stone, 2 R. I. 109, 57 Am. Dec. 709.

O'Conner v. O'Conner, 20 R. I. 257, 38 Atl. 370.
Nichols v. Rosenfeld, 181 Mass. 525, 63. N. E. 1063.
Craige v. Craige, 41 N. Car. 191.
Rakestraw v. Brogden, 56 Ga. 549.
Vennum v. Vennum, 61 Ill. 331.
Robinson v. Cullom Co., 41 Ala. 693.
Elyton Land Co. v. Iron City Steam Bottling Works, 109 Ala. 602, 20 So. 51.
McMichael v. Kilmer, 76 N. Y. 36.
Brown v. Bulkley, 14 N. J. Eq. 450.
Pasman v. Montague, 30 N. J. Eq. 385.
Keen v. Maple Shade Land & Imp. Co., 61 N. J. Eq. 497.

Bills to quiet title or remove clouds on title can only be maintained in the Federal Courts where the plaintiff is in possession, or the land is vacant and unoccupied.

Whitehead v. Shattuck, 138 U. S. 146, 34 L. Ed. 873.
Lawson v. U. S. Min. Co., 207 U. S. 1, 52 L. Ed. 65.
Stockton v. O. S. L. Ry. Co., 170 Fed. 626.
Whitehouse v. Jones, 12 L. R. A. (N. S.) 76, note.

Parol authority is sufficient to authorize the filling of blanks in deeds, bonds, powers of attorney and other instruments after execution.

Drury v. Foster, 69 U. S. 24, 17 L. Ed, 780
3 Enc. L. & P. 431, 432.
Bridgeport Bank v. New York etc. R. Co., 30 Conn. 231, 274.
McClung v. Steen, 32 Fed. 373, 376.
Executors of Lamar v. Simpson, 1 Rich. Eq. (S. C.) 71, 42 Am. Dec. 345.
McCleary v. Wakefield, 76 Ia. 529, 2 L. R. A. 529.
Swartz v. Ballou, 47 Iowa 188, 29 Am. Rep. 470.

Creveling v. Banta, 138 Iowa 47, 115 N. W. 598.
Exchange Nat. Bank v. Fleming, 63 Kan. 139, 65 Pac. 213.
Field v. Stagg, 52 Mo. 535, 14 Am. Rep. 435.
Thummel v. Holden, 149 Mo. 677, 51 S. W. 404.
Carr v. McColgan, 100 Md. 462.
Cribben v. Deal, 21 Ore. 211, 27 Pac. 1046.
Mason Lumber Co. v. Collier, 74 Mich. 241, 41 N. W. 913.
Stahl v. Berger, 10 S. & R. 170, 13 Am. Dec. 660.
Herr v. Denver M. & M. Co., 13 Colo. 406, 22 Pac. 770.
Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262.
Bulkley v. Devine, 27 Ill. App. 145.
Phelps v. Colquitt, 73 Ga. 59, 54 Am. Rep. 867.
Johnson Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39.
Clemmons v. McGeer, (Wash.) 115 Pac. 1081.

Authority to fill such blanks may be implied from circumstances, and possession and control of an otherwise duly executed instrument containing blanks necessarily implies an authority in the holder thereof, or his appointee, to fill out the blanks.

2 Cyc. 159, 160.
3 Enc. L. & P. 433, 435.
Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317.
Inhabitants of South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535.
Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209.
Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486.
Friend v. Ward & Yahr, 126 Wis. 291, 1 L. R. A. (N. S.) 891.
Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182.
Clemmons v. McGeer, (Wash.) 115 Pac. 1081.
Reed v. Morton, 24 Neb. 760, 1 L. R. A. 736.

State v. Matthews, 24 Kan. 596, 25 Pac. 36.
Guthrie v. Field (Kan.) 116 Pac. 217.
Chapman v. Veach, (Kan.) 4 Pac. 100.
Eagleton v. Gutheridge, 11 M. & W. 465.
State v. Young, 23 Minn. 551.
Leavitt v. Fisher, 4 Duer 1 (N. Y.)
White v. Duggan, 140 Mass. 18, 54 Am. Rep. 437.

Authority to fill blanks in powers of attorney will be implied from the fact that they are in the possession and control of an agent, and this implication is strengthened by evidence of custom or commercial usage in relation to such powers.

Commercial Bank v. Kortright, *supra.*
Eagleton v. Gutheridge, *supra.*
Vliet v. Camp, 13 Wis. 198.
Markham v. Comaston, Moore (K. B.) 547.

Knowledge of the fact that the instrument was executed in blank does not give the party taking it notice of limitations on the authority, nor put him on inquiry as to the extent of the authority.

2 Cyc. 162.
Commercial Bank v. Kortright, *supra.*
Burk v. Johnson, 146 Fed. 209.
Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182.

The fact that the blanks are filled up in violation of the authority does not impair the validity of the instrument in any way, because parties who deal with the agent are entitled to rely on his apparent authority.

2 Enc. L. & P. 440, 442, and cases cited.
Inhabitants of South Berwick v. Huntress, 53 Me. 89, 87. Am. Dec. 535.
Chicago v. Gage, *supra.*
Clemmons v. McGeer (Wash), 115 Pac. 1081.
Guthrie v. Field (Kan.), 116 Pac. 217.

Where negotiable instruments are executed with blanks as to the name of payee, place of payment, etc., a bona fide holder who fills the blanks will be protected on the ground that he had implied authority to fill them.

Angle v. Insurance Co., 92 U. S. 330, 23 L. Ed. 556.
Michigan Ins. Bank v. Eldred, 9 Wall. 554, 19 L. Ed. 763.
First Nat. Bank v. Barnum, 160 Fed. 245.
Cox v. Alexander, 30 Ore. 438, 46 Pac. 794.
Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573.
Nat. Exchange Bank v. Lester, 194 N. Y. 461, 21 L. R. A. (N. S.) 402.

Appellant Cobban bought and paid for the right to select the lieu lands, and as neither appellee nor Benson had any beneficial interest therein after his purchase he was fully authorized to insert his name in the powers of attorney to convey, and to convey as attorney in fact of appellee.

Authorities cited *supra.*

Appellee cannot ratify the act of her agent insofar as it benefits her and repudiate or disaffirm the part which may not be for her benefit. The ratification or disaffirmance must be *in toto.*

Rader v. Maddox, 150 U. S. 128, 37 L. Ed. 1025.
Egbert v. Sun Co., 126 Fed. 568.
Sutherland v. Ill. Cent. R. Co., 81 C. C. A. 620, 152 Fed. 694.
Clark & Skyles on Agency, Sec. 108.
2 Enc. L. & P. 862, and cases cited in notes.

Appellant, The Payette Lumber & Manufacturing Co., was a bona fide purchaser for value and without notice,

actual or constructive, of any equities or claims of the appellee and took the legal title free from all such equities or claims.

Guthrie v. Field, (Kans.), 116 Pac. 217.

The so called "revocation of powers of attorney" could not possibly operate as constructive notice of any defect in the authority of the appellant, Cobban, because it was not recorded until long after the power vested in him had been fully executed and it was, therefore, entirely outside of the chain of title of appellant company.

People v. North River Sugar Refining Co., 121 N. Y. 582; 9 L. R. A. 33;
Revised Codes of Idaho, Sections 3149, 3154, 3159 to 3162.
Harris v. Reed, 21 Idaho 364; 121 Pac. 780;
Satterfield v. Malone, 15 Fed, 445; 1 LRA. 35;
Boynton v. Haggart, 57 C. C. A. 301; 120 Fed. 819;
Ely v. Wilcox, 30 Wis. 523; 91 Am. Dec. 436;
McLanahan v. Reeside, 9 Watts 508; 36 Am. Dec. 136;
Blake v. Graham, 6 O. Sta. 580; 67 Am. Dec. 360;
Ford v. Unity Church Society, 120 Mo. 498; 23 L. R. A. 561; and cases cited in note.
Somes v. Brewer, 2 Pick. 184; 13 Am. Dec. 406;
Calder v. Chapman, 52 Pa. 359; 9 Am. Dec. 163;
Woods v. Farmere, 7 Watts 382; 32 Am. Dec. 772;
Board of Education of Minneapolis v. Hughes (Minn.), 136 N. W. 1095;
Richardson v. Atlantic Coast Lumber Company, 75 S. E. 371;
Perkins v. Cissell, (Okla.), 124 Pac. 7;
White v. McGregor, 92 Tex. 556; 50 S. W. 564.
Fullenwider v. Ferguson, 30 Tex. Civ. Appeals, 156; 70 S. W. 222;
Treadwell v. Inslee, 120 N. Y. 458; 24 N. E. 651.

The recording acts do not require a purchaser to look one day or one page beyond that which contains the title of his grantor, and in this case the appellant company was not required to search for or charged with notice of revocation of Cobban's agency filed for record after the deed to Weirick was recorded.

Connecticut v. Bradish, 14 Mass. 296;
Losey v. Simpson, 11 N. J. Eq. 246;
McLanahan v. Reeside, Watts 508; 36 Am. Dec. 360;
Corbin v. Sullivan, 47 Ind. 356 and cases cited *supra.*

Record title and possession constitute complete *indicia* of absolute ownership, and the law does not require a purchaser to make further inquiry.

Quick v. Milligan, 108 Ind. 419.
Blight v. Schneck, 10 Penn. St. 285.
Hubbard v. Greeley, 84 Me. 340.

Public records import absolute verity and are presumed to be correct. They are not designed to mislead and the presumption is that deeds which appear to have been duly recorded have been delivered by the grantors therein named, and a *bona fide* purchaser, relying upon the records, is protected against wrongful deliveries by escrow holders.

Cases cited supra and
Moore v. Trott, 156 Calif. 353; 104 Pac. 578.
Fletcher v. Peck; 6 Cranch 87, 133;
Somes v. Brewer, 2 Pick. 184;
24 A. & E. Enc. L. 187.
34 Cyc. 614;
1 Washburn on Real Prop. 35, 95.

ARGUMENT.

Appellee, complainant below, came into court recklessly and heedlessly charging fraud and conspiracy to rob and defraud her of the Monache lands, against all persons with whom she had had any dealing or who had been connected in any degree with the title to the lieu lands selected in the State of Idaho. No one was exempted, but all were included in the wholesale charge of fraud on which the bill was founded. On these charges issue was joined by appellants, and the court found that the charges were wholly unfounded.

The Court said on this matter (trans. 499):

> "Moreover, there is no substantial foundation for the charge, elaborated at great length in the bill, that Benson, Campbell, Weirick, Cobban and others, conspired to defraud the plaintiff. So far as Cobban and and Weirick are concerned, together with their associates and the promoters and officers of the defendant, Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff. They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains."

The court also found, and it could not under the evidence do otherwise, that the charges against Mr. Campbell were equally unjust and unfounded. From the evidence in the record there would seem to be just ground for the belief that the charges of fraud and conspiracy were not made in good faith. The most that can be said in behalf of appellee as to these charges is that she unjustly ac-

cused innocent parties with a recklessness that should not be lightly condoned by the courts.

The district court, (no doubt unconsciously affected by the general notoriety which Benson has received in late years through litigation with the government and others concerning scrip selections), was not prepared to say that Mr. Benson was entirely free from criticism. This conclusion of the court seems to rest on a letter of December 11th, 1901, written by Mr. Benson to Mr. Campbell (Trans. 476-478, Exhibit "N-1"). While we are not defending Benson, we feel nevertheless that the trial court did Mr. Benson an injustice, for the letter referred to is not inconsistent with the agreement as Benson understood it. There is no attempt in this letter to conceal the fact that the lands had been deeded to the government under the lieu land selection act and that the scrip was being sold. He says:

> "All of the land, except 400 acres, has been deeded to the United States, and deeds placed on record, and selections made of other land in accordance with the provisions of the Act of Congress of June 4, 1897 (30 Stats., 36).
>
> This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements which in terms provided that after the land selected in lieu of the land surrendered had been located and said location had been accepted by the Commissioner of the General Land Office, and proper evidence furnished thereof, that the parties in whose interests the locations were made would, upon the delivery of a deed conveying the right to the owners, pay the amounts agreed upon.
>
> Up to the present date there has not been a single location accepted by the Commissioner of the General Land Office. It is my intention just as soon as these

acceptances can be had to ask for a confirmation of the sale by the Court so that settlements can be made to both the owners and the parties in whose interests the locations were made. We have been bringing every effort to bear to get the Commissioner of the General Land Office to act upon these matters, and as he has lately added several to the working force in his office it is likely we will not have very much longer to wait.

' * * * * * * * * * * *

The Commissioner also refuses to allow the withdrawal of selections already made until the present ones are acted upon, giving as a reason in similar instances, that the locator might desire to select more valuable lands than those selected at present.

At the time these locations were made there was little or no sale for Forest Reserve direct except upon the condition that it were accepted by the Commissioner of the General Land Office. At present if we could only get back the deeds given to the United States there would be little difficulty in disposing of the land.

I have employed counsel specially at Washington to try and secure these approvals and just as soon as obtained, so as to get confirmation of sales will report promptly.

I regret exceedingly these complications, but I had no reason to expect them, as at the time the locations were made approvals were progressing rapidly. I have many times this amount of locations in my own business delayed in a similar manner."

It is true that Benson says in his letter that all, "or nearly all' scrip sold, based on this land, had been sold under agreements under which the purchaser was not to pay until the scrip had been approved by the government; that is to say, until the government had approved the exchange, or the title to the Monache lands. There is nothing in the evidence to show that the particular scrip sold to Mr. Cobban was protected by such agreement, but it is reasonable

to presume that if the government had not accepted the scrip Mr. Cobban would have demanded a return of his money from Mr. Benson, and Mr. Benson, in order to protect himself, naturally hesitated to pay over the money to Mrs. Conklin or the owners of the base lands until the scrip was approved. If he turned it over before and the scrip should be rejected by the government, Mrs. Conklin and her associates would not only have the money which they had received for the scrip, but they would also hold the base lands which the government declined to accept. Benson could not protect himself against such contingencies without retaining the money until the General Land Office approved the scrip selections. If they were rejected he could refund the money to the purchaser of the scrip, and Mrs. Conklin and her associates would be exactly in the position they were before the scrip was sold—they would still have the base lands which the government had declined to accept.

Mr. Benson's letter shows clearly that he was not trying to conceal the fact that the papers were not in escrow, and that he was selling the scrip as fast as he could find a buyer and that a large part of it had in fact been sold. It shows that he was employing counsel at his own expense in an effort to secure an early approval of the scrip selections by the government.

This letter was transmitted by Mr. Campbell to appellee on the same date (Trans. 475) and we respectfully submit that there is nothing in this correspondence, or any correspondence found in the record, to justify the suspicion of appellee and her son that there was a criminal conspiracy to cheat and defraud her on the part of Benson. The record, on the contrary, shows that Benson was induced to advance money out of his own pocket to appellee and her co-owner before he sold any of the scrip (Tr. 352-3, 392).

The record further shows that appellee in April, 1903, (Tr. 484) repudiated her contract and in effect declined to accept any further payments, but on the contrary offered on certain conditions, which it was impossible to comply with, to return the money which she had previously received.

It is also conceded that appellee and her son, since about the middle of December, 1901, have done every thing in their power to induce the government to reject lieu land selections based on the Monache scrip, and as a result of this Benson and the purchasers of the scrip became involved in expensive and protracted complications with the land department, and payment for the scrip was delayed accordingly. Appellee and her son have not co-operated in any sense in carrying out the agreement with Benson, but on the contrary have done everything in their power to embarrass both Benson and those who purchased the scrip.

Mr. Cobban did not purchase the Monache lands from appellee, neither did he purchase the Idaho lands selected in lieu thereof, but he purchased the *right of selection,* commonly known as scrip. Having purchased such right to select, or the scrip, he had the right to insert in the so-called powers of attorney the name of the agent who should select the Idaho lands, and he had the right to fix the terms and prices upon which such lands should be sold. Clearly, appellee had no interest in such selections or in such agency, for when Cobban paid for the scrip the interest of appellee ceased, not only in the scrip, but in the selections to be made, and while the selections were made in her name as principal that was at most but a fiction in order to satisfy the regulations of the department that the selections should be made and patents issued in the name of the person who conveyed the base to the government.

Cobban conveyed for a valuable consideration under a warranty deed to Weirick, and neither Cobban nor Weirick had any knowledge of the irregularities complained of by Mrs. Conklin. Weirick conveyed to the Payette Lumber & Manufacturing Company, and it purchased upon the records showing clear title in Weirick. None of the appellants had actual notice of any of the things complained of.

Appellee, although she claims to have become suspicious of a gigantic conspiracy to defraud her as early as the latter part of 1901, and although she knew in 1902 that lieu lands had been selected in her name in Boise County, Idaho, commenced no action to recover the lands or to assert her rights therein until September 7th, 1905, when the original bill in this suit was filed, and since the suit was filed she has been guilty of gross delays in prosecuting it. She has been content to let appellants pay the taxes and patrol the timber and protect it from destruction by fire and other agencies. She has been guilty of laches, and she comes into Court without offering to do equity or without offering to reimburse appellants for the moneys expended in the payment of taxes and in caring for and protecting the timber on the lands to which she now claims title. Her laches and her conduct from the beginning have been such that she is not entitled to equitable relief.

She instigated suits on the part of the government and commenced suits in the California courts, all of which have been decided adversely to her contentions, but she has brought no suit or action against the alleged unfaithful agent to recover the amount due her on the purchase price, and she delayed bringing any suit against these appellants until nearly all the witnesses to the original transactions were dead.

Appellants are innocent in the premises and the wrongs, if any, which have been sustained by appellee have resulted directly from her own negligence and carelessness in relying upon verbal agreements when they should have been in writing, and in doing business through agents which she claims have been unfaithful and unworthy of trust or confidence.

The only equity advanced on behalf of appellee is that she has not received all of the purchase money, but the equity of appellants on that point is at least equal, for they have *paid* the entire purchase price to the agent selected by appellee; besides they are innocent purchasers under the recording laws.

It is a wholesome maxim, and it applies here with all its force, that where one of two innocent persons must suffer a loss, he, who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it. The party who enables another to commit a fraud is answerable for the consequences.

We have endeavored to classify some of the principal points involved in the case and we pass now to a consideration of those points.

Complainant Cannot Found Her Bill Solely on Fraud and Conspiracy and Recover on Some Inferior Ground of Relief.

The whole frame and texture of complainant's bill in the case at bar was fraud and conspiracy on the part of John A. Benson, Joseph C. Campbell, Appellants Cobban and Weirick, and the promoting stockholders of the Payette Lumber & Monufacturing Company. The trial court completely absolved appellants from every suspicion of fraud and conspiracy but it granted the relief prayed for on other grounds, and upon a different theory than that on which

the case was tried. This we respectfully submit was error. When a complainant plants his bill on the ground of fraud and conspiracy, he cannot recover on other grounds. This is sternly forbidden by the settled rules of equity pleading and practice. Several reasons have been assigned for the rule.

In the first place, charges of fraud and the like, imputing evil motives and moral turpitude are not to be lightly or recklessly made in courts of equity, and when made, such charges must be proved or the plaintiff will lose his case as a penalty for having made his bill an instrument of unfounded slander against his opponent. Secondly, the allegations and the proof must correspond and the relief given must be in accordance with both. Finally, defendants are entitled to know the theory on which their opponent relies, and if, after the case has been tried on the theory of fraud and the charges of fraud fully met and refuted as in this case, the court can grant relief because of facts alleged and proved merely as incidents to the fraud, defendants are wholly deprived of any opportunity to make a defense. By this change in theory facts which before were wholly irrelevant and immaterial become the ultimate facts of the case, and the defendants are unjustly prevented from having their day in court.

This is not a case where the plaintiff changed his theory in the course of the trial, as is allowed some times under Code practice where sufficient notice is given, but is a case where the whole theory of the action was changed in the decision of the Court, and these appellants had no opportunity whatever to meet the charges under the new theory. The general rule applicable to cases of this sort is thus stated in 16 Cyc. 485:

> "And if plaintiff has framed his bill to adapt it to a certain theory on which he bases his right to recover,

> the proofs must be such as to warrant a decree in conformity to this theory; and it is not enough that the proofs are sufficient to justify a decree in conformity to some other theory."

In the note to this section, it is said, p. 486:

> "Where a bill in equity is framed on the theory that there was fraud entitling plaintiff to relief, it must be proved as laid in order to warrant a decree in plaintiff's favor; and the proof of other facts, although included in the charge of fraud, and sufficient under some circumstances to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed."

The basis of this rule is of course that relief can only be given in accordance with the facts alleged, and its strict application in cases of fraud is due to the adherence of courts of equity to the principle that the charge of fraud is one which should not be lightly made. This rule is abundantly sustained by the English authorities, by numerous cases in the Federal Courts, including at least one case in this Court, and in numerous state courts.

In the leading case of Eyre v. Potter, 15 How. 42, 56, 14 L. Ed. 592, the Court said (p. 598):

> "It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited as directly in point, the case of Price v. Berrington, decided by Lord Chancellor Truro, in 1851. (*Vide* English Law and Equity Reports, Vol. VII, p. 254.)"

In the case of Price v. Berrington, 3 Mac. & G., 486, 42 Eng. Rep. 348, just referred to, the bill sought to set aside a conveyance for fraud, the facts relied on being that the grantor was insane at the time of the grant, that the grantee knew it and imposed upon him, that the agreed consideration was far below the value of the property, and only a portion of that consideration was paid. The insanity was proved, but none of the other facts alleged were proved. Lord Chancellor Truro dismissed the bill, although he was of the opinion that the insanity alone, if properly alleged, would have been sufficient ground for relief. His statement of the rule is adopted, word for word, by the Supreme Court of the United States in the quotation from Eyre v. Potter, *supra*.

In Curson v. Belworthy, 3 H. L. C. 742, 10 Eng. Rep. 294, a bill to set aside a conveyance charged fraud and imposition. The grantee was a poor, illiterate laborer who had come into a small inheritance and had been induced to sell it for an inadequate price. Proof of the fraud entirely failed, and it was held that the bill must be dismissed, although it might have been maintained on the ground that the conveyance was hastily and improvidently made if that ground only had been set up.

The most important English case, however, is Wilde v. Gibson, 1 H. L. C. 604, 9 Eng. Rep. 897. In this case the purchaser brought a bill for rescission of a contract of sale and cancellation of a conveyance on the ground that the vendor had fraudulently concealed the existence of a right of way over the property. The Vice Chancellor ordered the conveyance cancelled, although he found there was no fraud. On appeal to the House of Lords this decree was reversed. Lord Chancellor Cottenham said:

"It is in all cases important to consider how far the

> case proved is in conformity with the case alleged; but it is peculiarly so in cases founded upon alleged fraud, imputing dishonest practices to defendants. It is in all such cases essential to prevent the proceedings from becoming instruments of unfounded slander. Plaintiff should bear in mind that imputations which cannot be supported will not only not profit them, but may debar them from that relief to which they might be entitled on other grounds if properly brought forward. * * * The result appears to me to be, first, that the plaintiff having rested his case in the bill upon imputations of direct personal misrepresentation and fraud cannot be permitted to support it on any other ground; secondly, that the evidence at most proves only constructive notice of the fact upon the non-communication of which the plaintiff founds his claim for setting aside his completed purchase; and that nothing short of positive knowledge can be sufficient for that purpose. The case alleged is not proved, and the case proved is not alleged; and, if it had been, is not sufficient to support the decree."

Lord Brougham said in reference to the above quotation:

> "What my noble and learned friend has most justly observed is a principle of the highest importance to be kept in view in proceedings in equity—for the security of the court against imposition upon it—for the keeping straight and clear of the principles upon which its jurisdiction is to be exercised—for the safety of the characters of the parties—and for common justice."

Lord Campbell also concurred on the same ground. See also Glascott v. Lang, 2 Phill. (22 Eng. Chanc. Rep.) 310; Ferraby v. Hobson, 2 Phill. (22 Eng. Chanc. Rep.) 255; Montesquieu v. Sandys, 18 Ves. Jr. 313; Powys v. Mansfield, 6 Sim. 565.

These statements have been approved in numerous cases

in our state and Federal courts, and by leading text writers.

Beach, Modern Equity Practice, Sec. 99, says:

> "No facts are properly in issue unless charged in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence; for the court pronounces its decree *secundum allegata et probata.* A party can no more succeed upon a case proved but not alleged than upon a case alleged but not proved. Nor can any admissions in an answer, under any circumstances, lay the foundation for relief under any specific head of equity unless it be substantially set forth in the bill. 'It is an established doctrine of this court,' said Vice Chancellor Van Fleet, 'that where the bill sets up a case of actual fraud, and makes that the ground for the prayer for relief, the complainant is not in general entitled to a decree by establishing some one or more of the facts, quite independent of fraud, which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated.' " (Hoyt vs. Hoyt, 27 N. J. Eq. 399).

In Doggett v. Simms, 79 Ga. 253, 4 S. E. 909, Bleckley, Chief Justice, stated the reason of the rule vigorously as follows:

> "If a complainant cuts and slashes in the bill charging actual fraud, piling it up and up, without once suggesting constructive fraud, or a mere mistake as a ground for relief, why should the court charge anything on constructive fraud or bare mistake as entitling the complainant to a verdict? Must the court charge the jury on a theory of the case when the complainant has made no charge against the defendant based on that theory? If a transaction is so ambiguous as to bear three interpretations, such as actual

> fraud, constructive fraud, and mistake, why should not all three be alleged, so as to apprise defendant that all are to be canvassed, and so as to apprise the court in due time that all are to be relied upon; and what is not less important, so as to let the record speak the truth and the whole truth when the verdict is returned and a decree rendered? Is a man to be branded ambiguously and absolutely with actual fraud by a decree, when he has only made a mistake or committed a fraud in law but none in fact? The sooner we forsake superlative and exaggerated pleading the better. And nothing will do more to correct the evil than for courts to adhere to the ancient and salutary rule that the *allegata* and *probata* must correspond."

Probably the most carefully considered case on this subject is Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510. Here a surviving partner had conveyed half of the firm property to defendant at a time when the firm was largely indebted, and had absconded with the money received. The complainant, as Receiver of the firm, filed his bill in behalf of the creditors to have the conveyance cancelled on the ground of actual fraud by the surviving partner and the grantee. Proof of the fraud wholly failed. The court then discussed the question in regard to relief on other grounds, saying, (67 Am. Dec. p. 518):

> "The question which then arises is, whether, dropping this charge, which veins and intermingles with the whole frame and texture of the bill, and rejecting it as surplusage, we shall be justified, by the rules of the jurisprudence which we here administer, if on the allegations of the bill we can find some inferior ground of relief than the actual fraud charged of giving relief on that ground under this bill. It is said by the counsel for the complainant that we may and ought, and he seems to argue as if, refusing to do so, we

should be guilty of sacrificing the inherent justice of the case to a mere rule of chancery pleading and practice. Now, grant that this be so, what right have we to dispense with rules established by wisdom for our guidance in the exercise of a jurisdiction which, considering the fallibility of human judgment, necessarily leave us quite latitude of discretion enough? Whilst, on the one hand, we know no system of jurisprudence more beneficial in its administration than that of the English chancery, governed, as it is, by fixed and certain rules and principles, and flexible only to circumstances in the modes of relief of which its forms render it capable, we know of none, considering its power of specific action, which would become so oppressive, if, flexible in principles and rules as well as in its modes of relief, it were so altered as to make the chancellor the tyrant, instead of the judge of the causes before him.

"Whilst the door of the court has always been left wide open to relieve those who suffer from acts or practices of fraud— a great head of its jurisdiction —it has always been most careful to require of those who apply to it on this ground to scrutinize their causes of complaint before they enter it, and to allege and thus give notice, on the one hand, of that which they intend to prove, and to prove, on the other, that which they have alleged as the ground of the relief applied for."

After referring to the English cases with approval, the court said, p. 520:

"This rule, it will be noticed, does not suppose the bill to be defective in allegations to be met by proof establishing another ground of relief than that of actual fraud, but to be full in that respect; the difficulty being that these allegations are pointed with the others to such fraud, as the distinct ground of the relief which the bill invokes. Nor is the rule, as was remarked by

counsel in Price v. Berrington, 7 Eng. L. & Eq. 255, 'founded on any martinet principle of pleading.' On the contrary, Lord Cottenham, speaking of it in Glascott v. Lang, 2 Phill. 310, 'as a rule generally acted upon,' propounds it also 'as founded in justice,' 'because,' he continues, 'the door of this court being always open to allegations of fraud, it would be unjust, and much to be deprecated, to afford any encouragement to such allegations by allowing a party to try the experiment of obtaining relief on that ground, and if it failed, to fall back upon his bill for some inferior kind of relief.' This we deem to be sound morality, and fit to be observed by those who sit in the gateway of the court of chancery to administer the high-toned justice of that court." (Our italics).

And on page 524 the Court says:

"*In almost all these cases it will be found that the objection to relief was not that the bill did not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wished to fall back, but that having mingled with those allegations imputations of personal corruption or actual fraud, he had pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground or not at all.* * * * There is more difficulty, therefore, in detecting the true ground or grounds upon which relief is sought in courts of equity than in the courts of law; but when detected, the result in the former is precisely the same as in the latter, as to charges of deceit or fraud. In either forum, if they are the ground of the action, they must be proved; or however good may be the case of the plaintiff if brought forward in another way, he must fail in the way in which he has chosen to put it." (Our italics.)

The Court accordingly dismissed the bill, but indicated its opinion that the defendant had purchased partnership

property with notice, and could be charged as a trustee of it in equity. It should be noted that in the above case the allegations, independently of fraud, would have supported a decree for plaintiff, while in the case at bar it is extremely doubtful if enough facts are alleged, outside of fraud, to entitle the complainant to relief.

This rule has been acted upon time and again by the Federal Courts and in a great variety of cases. Thus in Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed. 334, 27 L. R. A. 67, a bill to enjoin the alleged infringement of a patent, charged actual fraud and conspiracy. Fraud was not proved, but the Circuit Court granted the injunction on the ground of infringement. The bill was dismissed by the Circuit Court of Appeals because the complainant had failed to prove fraud, and was therefore not entitled to relief because of mere infringement. The Court said, (66 Fed. p. 339):

> 'The charges of fraud have been made either under an entire misconception of the facts or with a recklessness that, at least, is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged."

The Court then quotes with approval from Price v. Ber-

rington, and Tillinghast v. Champlin, *supra*, and cites a number of other cases.

In Rejall v. Greenhood, 35 C. C. A. 97, 92 Fed. 945, this Court held that a complainant could not change the theory of his pleading from a claim under an assignment which had been set aside by the state court, which claim was based wholly on fraud, to a claim to an interest in the surplus after the creditors who complained against the assignment had been satisfied.

In Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801, the bill sought to set aside a prior decree of the same court. The complainant alleged that in the original cause the answer was filed on June 29, 1885, that he agreed orally to a hearing on the bill and answer, that said answer was withdrawn without his knowledge or the knowledge of the court and another answer fraudulently interposed on July 21st, that the Court heard the cause on the bill and the second answer owing to the fraud and trickery of the defendant, and upon that hearing dismissed the bill. The decision of the circuit court was that although no fraud was shown, nevertheless the judgment had been obtained under a mistake of the court and all parties, and therefore should be set aside. On appeal, it was held that the question of mistake was not open on the pleadings and the decree must be reversed. The Court said, at page 806:

> "Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764, says: 'A decree has to be founded on the *allegata*, as well as *probata*, of the cause.' This, as is well known, and for the best of reasons, is especially applicable to bills in equity charging fraud; and the rule is most strictly enforced under such circumstances. Daniell, Ch. Prac. (6th Am. Ed.) 382. A party who charges fraud assumes a grave responsibility by reason of making injurious allegations, which he cannot escape by substituting another issue in lieu thereof."

In Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209, the Court said:

> *"The gravamen of the bill is the alleged false and fraudulent representations of defendant, and the decree must be sustained, if at all, upon proof of the specific and definite fraud alleged in the bill.* 'The rule that the court will only grant such relief as the plaintiff is entitled to upon the case made by the bill is most strictly enforced in those cases where plaintiff relies upon fraud. Accordingly, it has been laid down that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any other ground.' Daniell's Ch. Pl. & Pr. vol. 1, page 380; Eyre v. Potter, 15 How, 41, 56, 14 L. Ed. 592; Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801. Attention is called to the foregoing rule because of a claim that the decree below might be supported on proof of a mutual mistake. We do not wish to be understood as intimating that the proof shows such a mistake, but the rule is alluded to for the purpose of sharply defining the issue before us. The questions arising on this appeal will be stated as the opinion progresses."

Here it was held that no fraud was established, and the Circuit Court was reversed. See also:

> C. B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 593, 51 L. Ed. 638.

and cases cited supra under 'Points and Authorities."

The rule is also sustained in numerous state courts, especially in those jurisdictions where the distinction between law and equity is still maintained. Thus, in Mt. Vernon Bank v. Stone, 2 R. I. 109, 57 Am. Dec. 709, the complainant alleged that his agent had fraudulently failed and re-

fused to account, but as he did not prove the fraud the court held that he could not claim an accounting because of the mere failure or refusal of the agent to account.

In Nichols v. Rosenfeld, 181 Mass. 525, 63 N. E. 1063, Chief Justice Holmes said:

> "The cases come before us on frivolous bills of exceptions concerning which perhaps it would be enough to say that in this court the charge of fraud is regarded as something more serious than a rhetorical embellishment, that if a man puts his case on that ground he must maintain it or lose it, and that the plaintiffs on evidence made it abundantly clear that if there was any fraud it was not on the defendant's side."

See also cases cited supra under Points and Authorities.

The above authorities are absolutely controlling, and the facts of this case bring it precisely within the rule laid down. The whole frame and texture of the bill, from beginning to end, is fraud, and when the bill is compared with the decision of the lower court it is seen that proof of these allegations wholly failed.

After the formal and jurisdictional allegations of the bill, and a description of the "base lands," it is alleged on information and belief (trans. p. 11) that during the month of August, 1900, John A. Benson, Joseph C. Campbell, appellants Cobban and Weirick, and certain promoting stockholders of the appellant Payette Lumber & Manufacturing Company, *"did wrongfully and unlawfully agree, and did conspire and confederate together by means of artifice and deceit to surrender said 'base lands' and to select other lands in lieu thereof, and to cheat and defraud complainant out of said 'lieu lands' when selected,"* and *"did conspire to cheat and defraud complainant out of the title,*

right of possession, and possession and proceeds thereof," and "converted the proceeds to their own use."

The Court said (trans. p. 496): "Neither Cobban nor his associates personally knew Benson, Campbell, Conklin or Reddy." and at page 499 states:

> "Moreover, there is no substantial foundation for the charge, elaborated at great length in the bill, that Benson, Campbell, Weirick, Cobban and others, conspired to defraud the plaintiff. So far as Cobban and Weirick are concerned, together with their associates and the promoters and officers of the defendant, Payette Lumber & Manufacturing Company, *it is enough to say that there is no basis for a suspicion even that they purported to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff.* They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains."

(Our italics.)

The balance of the complaint is replete with allegations of fraud and conspiracy. Thus, at page 14 of the transcript, the complainant alleges that she reposed trust and confidence in Campbell and Benson, but that neither of them at any time intended to carry out their promises; at page 15 she alleges that Campbell "wrongfully and fraudulently and in furtherance of said conspiracy" misrepresented the effect of the deeds sent to her for her signature; at page 17, that certain applications for selection of lieu lands and powers of attorney were signed by complainant, relying on Campbell's representations that they were deeds of certain "base lands" to Benson; and at the bottom of the page, that Benson and Campbell, knowing that complainant trusted them and would sign any papers Camp-

bell sent without question, *surreptitiously, and in furtherance of said conspiracy and scheme to defraud, inserted said powers of attorney among the deeds that Campbell sent to complainant for her signature;*" on pages 19 and 20, complainant alleges that certain representations made by Campbell were false and fraudulent, and in furtherance of the said conspiracy. It should be noted that the facts here alleged occurred long after the conveyance of the lands in question to Weirick. On page 34, complainant alleges that Cobban and Weirick were mere dummies and tools of Benson and Turrish and the promoting stockholders of the Payette Lumber & Manufacturing Company; at page 36 it is said, "that said alleged powers of attorney and alleged conveyance to Weirick, Trustee, are invalid and fraudulent and forged, and constitute a cloud upon complainant's title to said lieu lands." In the prayer at page 37, appellee prays "that the alleged power of attorney be declared false and forged, and said alleged deed to Weirick, Trustee, be cancelled and annulled."

It is thus seen that the charges of fraud and conspiracy are so interwoven with the whole texture of the bill as to be almost inseparable from any other allegations.

The answer of the trial court to all these allegations has been quoted above. The court expressly found that there was no fraud in the original agreement between Mrs. Conklin, the Reddys and Benson, but only a misapprehension on the part of Mrs. Conklin as to the exact means of carrying out the exchange. The court does hold that Benson did not subsequently perform that agreement and that his subsequent conduct did not "harmonize with the ordinary standard of honesty and fair dealing," (p. 504). This was based on his letter of Dec. 11, 1901, quoted in the opinion (Tr. p. 504, 505) which showed that all the applications were being held up in the Department and from which it may per-

haps be implied that no money had yet been received from the prospective purchasers of the lieu lands; but this was months after Cobban had bought and paid for the scrip, and had selected the lands in question. So this subsequent conduct on the part of Benson even if susceptible of the construction placed on it by the Court could not possibly taint the prior transaction.

The Court said (Tr. p. 517):

> "It is to be added, that, while as has already been said, the defendants are guilty of no moral wrong, and are wholly exonerated from the charges of fraud preferred in plaintiff's bill, it is doubted whether, in purchasing the scrip, they exercised that measure of care required of those who would claim the protection of the maxim which they invoke."

The evidence showed that appellant Cobban exercised ordinary care in regard to the purchase of this scrip, and certainly a failure to exercise extreme care is no ground on which complainant can rely for relief in equity.

The decision was not, however, based on any misrepresentations by Benson nor on any breach of duty by Campbell, because neither of these persons were parties to the action, and no privity was shown between them and appellants. The trial court thus completely exonerated appellants from the charge of fraud, and cancelled the conveyances on the ground that the original conveyances to Weirick, Trustee, were made under powers of attorney, delivered by appellee's agent in violation of instructions, not known to appellants.

This change in the theory of the case was made after the evidence was introduced, after the briefs had been submitted and after the argument had been made, and appellants had absolutely no opportunity to attack the new the-

ory. Mistake as a ground for relief was neither alleged nor proved, and the only possible equitable ground for relief upon the facts and law, as stated by the Court, is that of cancelling a cloud on title. But it is conclusively settled in the Federal Courts that a bill to cancel a cloud on title can only be maintained where the plaintiff is in possession, or the land is vacant and unoccupied. See:

Whitehead v. Shattuck, 138 U. S. 146, 34 L. Ed. 873.
Lawson v. U. S. Min. Co., 207 U. S. 1, 52 L. Ed. 65.
Whitehouse v. Jones (W. Va.) 12 L. R. A. (N. S.) 76, note.
Stockton v. O. S. L. R. Co., 170 Fed. 626.

Appellee had alleged in her bill that the land was vacant and unoccupied and not in the possession of appellant, The Payette Lumber & Manufacturing Company (Trans. pp. 3, 4). The appellant Company, however, denied these allegations and affirmatively alleged its own possession (Trans. pp. 42, 54). As long as the theory of the case was fraud the question of possession was doubtlessly immaterial, but when the Court by its decision made the theory of the case that of removing a cloud on title, possession became one of the material and ultimate facts. Appellee had given no evidence on this point and appellants had no opportunity to show their own possession. But the Court assumed appellants were in possession for it says in its opinion that they have undoubtedly incurred expenses aggregating considerable amounts "in caring for the timber growing thereon, and in paying taxes and other charges." (Tr. 518.)

This change in theory was therefore absolutely prejudicial to them, for they had tried the case on the issues raised by the pleadings. The rule established by the authori-

ties above cited is therefore peculiarly applicable to this case. The charges of fraud are the gravamen of the complaint, the court's decision wholly negatives fraud and entirely changes the theory of the case, and relief should not have been given on any inferior ground of equity jurisdiction, even if such inferior ground had been alleged and proved.

Appellant Cobban Had Implied Authority to Insert His Own Name in the Blank Powers of Attorney and to Convey to Weirick as Attorney in Fact of Appellee.

Aside from the questions of pleading and practice it is submitted that the trial court erred in its conclusions of law (trans. pp. 509-517). In the first place it held that the conveyances from Cobban to Weirick were without authority, especially in view of the fact that the powers of attorney as sent to Cobban were in blank as to the name of the attorney in fact, and Cobban inserted his own name therein. This holding is predicated on a misconception of the decision in Allen v. Withrow, 110 U. S. 119, 28 L. Ed. 90-94. That was a case of an express oral authority to Allen to fill in the name of his wife as grantee. He had delivered the deed with the name of the grantee still in blank, and the blank had never been filled out. The observation quoted from Mr. Justice Field can have no bearing on the question here involved, which is, whether an authority in appellant Cobban to fill the blanks in the powers of attorney can be implied from the circumstances.

The feature in the case at bar which the court relied upon to distinguish it from the case of Conklin v. Benson, (Cal.) 116 Pac. 34, was that Cobban himself filled the blanks in the powers of attorney. Appellant's contention is that he had implied authority to do so, and that the existence of the

blanks was no notice of any defect in the agency, or of any secret understanding as to payment being a condition precedent to such authority. Here the seller had no interest in the acts of the agent, and it was wholly immaterial to the seller whether the agent was honest, competent or otherwise, for Cobban purchased the scrip, or right of selection, and not the land after it was selected.

The strict rule that a deed or power of attorney executed with the name of the grantee or attorney in blank is invalid unless filled out in pursuance of an authority in writing, has been repudiated in almost every American jurisdiction. It rests on the ancient theory of the peculiar sanctity of sealed instruments, which has been done away with in Idaho by Section 3319 of the Revised Codes, which reads as follows:

> "All distinctions between sealed and unsealed instruments are abolished."

Such a provision is found in a majority of our state jurisdictions. In the case of Drury v. Foster, 69 U. S. 24, 17 L. Ed. 780, it was said:

> "We agree—if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted, although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument. The better opinion at this day is that the power is sufficient."

In 2 Cyc. 159, 160 it is said:

> "It may be laid down generally that if one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered

to be filled up properly, according to the agreement between the parties, and when so filled the instrument is as good as if originally executed in complete form; and if one sign or indorse a note or bill containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original agreement. As has been pointed out, however, this is a question of authority, and not of alteration of a completed instrument.

"*If a party to an instrument intrusts it to another for use, with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same;* and as between such party and innocent third persons the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody. Even if the note is not a negotiable one, still the rule above stated is held to be the same as to the liability of the person signing the blank, if it is a contract for the payment of money, for the leaving of a blank raises the implied authority to treat the person with whom the paper was intrusted as an agent authorized to fill the blank. So the doctrine applies, whether the paper is discounted or is delivered in payment of an existing debt.

In like manner any *bona fide* holder into whose hands the instrument passes has authority to fill blanks to perfect the instrument." (Our italics).

And at page 162 it is said:

"One who signs a blank piece of paper cannot be bound without showing an authority to fill it, unless some principle of estoppel can be applied, and as between the signer and the party to whom the instrument is intrusted, or as between the former and a subsequent purchaser with notice of limitations upon the authority of the person to whom the instrument is intrusted, the signer cannot be bound by the filling of unauthorized

> blanks or the excessive exercise of authority in filling blanks intentionally left to be filled. *But it does not matter that the party taking such instrument has knowledge of the mere fact that it was executed in blank, so long as there is nothing to put him on notice that the authority thereby conferred is restricted or has been violated.*" (Our italics).

These quotations are fully borne out by numerous cases cited in the notes.

The question of filling blanks in instruments after execution is fully treated in 3 Enc. L. & P., 428-448. At page 430 it is said:

> "The strict rule of the English Courts has been applied in a number of the states of the Union."

Cases are then cited from several jurisdictions showing that in most instances the earlier cases supporting the English rule have been overruled or modified. At pages 431-432, the same author states:

> "But the courts of other states of the Union have taken the view that the principle that an authority to make a deed or execute a sealed instrument for another must be under seal should be limited to the execution of a sealed instrument by one person for another; and it is considered that the mere completion of an imperfect sealed instrument by the filling of blanks left therein does not come within the inhibition of the rule that authority to make a sealed instrument must be under seal. In line with this view, cases are found which have sustained the sufficiency of parol authority to fill blanks in sealed instruments such as deeds, bonds, mortgages, and powers of attorney under seal."

At page 433 it is said:

> "It may be stated as a general rule, which is unquestionably applicable to all simple contracts in writing,

> and, according to some authorities, also to specialties, that where a person, intending to enter into a contract, delivers to another a writing containing blanks, evidently meant to be filled, this creates in the receiver of such instrument, and, at least in the case of negotiable papers, in his tranferees, an implied authority to complete the instrument by filling the blanks in the way apparently contemplated by the maker, with matter in general conformity to the character of the writing, provided it be done within a reasonable time."

To support the latter statement cases are cited from Alabama, Colorado, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Missouri, New York, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and Wisconsin. At page 435 it is said:

> "Where the view obtains that authority to fill blanks in sealed instruments can be conferred only by an instrument under seal, there can, of course, be no implied authority to fill such blanks.
>
> "*But in jurisdictions holding that blanks in specialties may be filled in pursuance of parol authority, such authority need not be expressly given, but may be implied from the circumstances of the case.*" (Our italics).

Many of the cases have involved negotiable instruments, but as the rule is based on principles of agency the precise nature of the instruments, whether it be a note, deed, bond, mortgage, or power of attorney, is wholly immaterial.

In 3 Enc. L. & P., 440-442, the author speaks as follows in reference to the filling of blanks in violation of the authority given:

> "It is a well-settled principle, applicable to both negotiable and non-negotiable contracts, that, where a person, with intent to execute a contract, delivers to another an incomplete instrument, and such other has

> authority, either expressly given or implied by law, to complete the instrument, such instrument is enforceable in the hands of a purchaser for value and without notice, notwithstanding the blanks have been filled up in a manner violative of the authority conferred.
>
> "This doctrine is based on principles of agency. The filling of such blanks in a wrongful manner by a person having express or implied authority to fill them in another way is deemed to be a breach of confidence merely, and is held to be within the scope of the principle that, where one of two innocent persons must suffer through the wrongful act of a third person, the loss must fall on that one who reposed confidence in such third person and thereby enabled him to perpetrate the wrong."

Of the numerous authorities cited in support of the above propositions we only wish to refer to a few of the more important ones. The case of Bridgeport Bank v. New York etc. R. Co., 30 Conn. 231-274, involved the question of a parol authority to fill a blank in a power of attorney under seal. The court said:

> "Nor can any reason be assigned which is founded in good sense and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties and nothing but an extreme technical view derived from the ancient law of England can justify the making of any distinction between them."

In Commercial Bank v. Kortright, 22 Wend. 348, 34 Am. Dec. 317, the question of an implied authority to fill blanks in a power of attorney to transfer a stock certificate was involved, and there, as here, evidence of commercial usage

had been given to show that this was customary. The court said (34 Am. Dec. 325):

> "The power of attorney to transfer, etc., was made in blank by the owner placing his name and seal with the subscription of a witness upon the back of the certificate, which was sent for the purpose of having a power written above the name and seal, to any person who might advance money on its security, to whomsoever he might direct: was that power valid when thus written? This objection, like the last, would have been more formidable in England a century or two ago, than it is now in this country. Evidence was given that this was the customary mode for years of transferring stock in our great stock market of New York, as well as elsewhere. Such a custom certainly could not vary the settled law, if that pronounced a deed or other sealed instrument to be void when written and executed in this manner; but the evidence of custom is good not to contradict or change the law, but to explain the meaning and intent of parties in contracts: as here, to show Barker's understanding and design in regard to the authority he gave. Judge Edwards, at the trial, stated its effect with precision. He said that 'the testimony was legal proof not to vary the law, but to show Barker's intention in thus executing an instrument in blank.' "

And at page 326 the Court states:

> "Now the writing of a whole power to transfer, with verbal or implied authority to do so, above a seal and signature on the back of a stock certificate, where nothing else could with any propriety be possibly written, is a far smaller excuse for delegated authority, than where the name of a party is inserted, or still more the sum for which he is to become bound. There the responsibility that the agent may impose upon his principals is unlimited. Here it is confined to the hundred shares of stock, with the latitude of inserting one

name or another as the vendee, pledgee, or the attorney."

In the case of Eagleton v. Gutheridge, 11 M. & W. 466, notwithstanding the strictness of the English courts as to filling blanks after execution, it was held that the filling in of a blank in a sealed power of attorney sent from a foreign country did not invalidate it because the authority to fill the blank was implied. Two other cases involving blanks in powers of attorney and holding the same rule, are Markham v. Comaston, Moore (K. B.) 547, and Vliet v. Camp, 13 Wis. 198.

But there can be no difference between an implied authority to fill a blank in a power of attorney and an implied authority to fill a blank in a deed, bond, or other instrument in writing. A leading case in this country on the general subject is Inhabitants of So. Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535. The Court said (87 Am. Dec. 536, 538, 539, 542):

"It seems to be now well settled that where a party executes a deed or bond or other instrument, and gives authority to that person to fill up the blanks, and thus perfect the instrument, and he does so, its validity cannot be controverted. *This authority may be by parol. It may be implied from the facts proved when those facts, fairly considered, justify the inference. When the authority is established, either by evidence of express authority, or by implication, the power will extend as far as such express or implied authority is given.* The law on this subject has recently been stated by the supreme court of the United States in Drury v. Foster, 2 Wall. 24. * * *

"The law on this subject in Massachusetts, before the separation, is stated by Chief Justice Parsons in Smith v. Crooker, 5 Mass. 538. That was a case on a collector's bond, in which, after the surety had signed,

a blank had been filled. The judge after stating the general principle, that it would not be an alteration which would avoid the bond, to fill up blank spaces left, if the party executing the bond agrees that it may be afterwards filled up, says: 'And the party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond.' This decision is cited and accepted by the counsel on both sides as the rule to be applied to the case at bar.

"It was adopted by the presiding judge, but he ruled that the filling of the blank space left for the insertion of the penal sum did not come within the rule. The correctness of that ruling is the question now presented by the exceptions.

"*It is evident that the implied authority is limited, but it clearly may extend beyond mere matters of form, or the mere insertion of words, which the law itself would supply. It may, as it has been shown, extend to those matters which are required to make it a binding and perfect instrument.* * * *

"The rule invoked is purely technical. Practically, there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz.: that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." (Our italics).

In Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209, the Circuit Court of Appeals for the Eighth Circuit said:

"The deed executed, acknowledged, and deposited in escrow by Johnson and his wife was for the convenience and at the request of Burk executed in blank, the name of the grantee being omitted, with the agreement made at the time that Burk might thereafter direct what name should be inserted. Presumptively, as the consideration for the assignment of the copyright was payable to Burk, he had a right to fill in his own name. He substantially did so, and caused the deed, with the blank so filled, to be duly recorded in the proper recorder's office. Did this avoid the deed? We think not. It carried out the undoubted intention of the parties, and executed the contract as actually made. A deed to real estate situated in the state of Kansas need not be executed under the seal of the grantors (Section 1195, Gen. St. 1901), and accordingly the deed in question was not so executed. In such circumstances, whatever may be the rule in cases where the deed must be a specialty, parol authority, express or implied, to fill in a grantee's name after execution by the grantors is sufficient, and when done the deed is good. Mechem on Agency, Sec. 94, and cases cited; Am. and Eng. Ency. of Law, vol. 1, p. 955, and cases cited. Even if the conveyance is by law required to be under seal of the grantor, there is abundant authority and reason for holding that a blank left for the name of grantee may be filled in by the grantee after execution." (Citing cases).

In Van Etta v. Evanson, 28 Wis. 33, 9 Am. Rep. 486, it was said:

"The only question of law in the case is as to the authority of Hegg thus to fill the blanks. It does not appear that the defendant directly or expressly authorized Hegg to insert the name of the plaintiff or of any particular person; and his authority to do so, if it existed, is to be implied from the facts and circumstances of the execution and delivery of the papers. It

is insisted that no such authority can be implied, or expressly given by parol, to write or insert anything in a sealed instrument after delivery, and that a redelivery is necessary to give it any validity. Authorities to this effect, and we believe all that are to be found, are cited. On the other hand cases holding the opposite doctrine are cited. The latter are considerably the most numerous, and among them is a case in this court. Vliet v. Camp, 13 Wis. 198. This last really controls the present case, unless it is to be overruled; and we certainly see no occasion for that. The grounds upon which the opposite decisions proceed are well stated by Chief Justice Marshall in The United States v. Nelson & Myers, 2 Brock, 64. *They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away.*" (Our italics).

In Friend v. Ward & Yahr, 126 Wis. 291, 1 L. R. A. (N. S.) 891, the same court said:

"But the general rule is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to, in form, give it full validity upon the filling up of blanks, authority for the holder thereof to do that is implied."

In State v. Young, 23 Minn 551, it was said:

"We therefore hold that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way by which it might be given in a sealed instrument. (Citing cases). * * * There is no claim that express authority was given, but this is not necessary. Such authority may be implied from the circumstances. It may be implied from the facts proved, when these facts all taken together and fairly considered justify the inference."

In the case of Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182, an official bond was executed by the obligor and some of the sureties, with the name and term of the office, the date, the penal sum and the names of other sureties in blank, and was left in the custody of the obligor. This was done with the understanding that the sum to be inserted should not exceed $250,000. The blanks were filled with the knowledge of the obligor, and a larger sum than $250,000 was inserted. It was held that the bond was valid and that, assuming the obligee knew of the existence of the blanks, there was no notice of the secret agreement. The court said, (35 Am. Rep. 189, 191):

> "The position taken is, that any material defect whatever apparent upon the face of the bond is sufficient to give notice of the actual facts respecting the condition of the execution of the bond. There were several defects here apparent upon the face of the bond, but no one of them, that we can see, should affect the obligee with notice that it was the understanding of the sureties that the penalty of the bond was not to be more than $250,000, or put them upon inquiry on the subject to ascertain whether it was not to be any larger than that. Surely, the lack of a date in the bond would not do so; nor the absence of the names of the sureties in the body of the bond; nor the omission of the name of the office; and no more so, as we conceive, did the blank in the bond for the penal sum. This could not excite suspicion of there having been a limitation of the amount of the penalty. One could reasonably be led to infer no more from it, than that as by the law the amount of the penalty was to be fixed by the common council, the penal sum had been left blank to be filled in when the common council should have determined what the amount of the penalty should be. *Under the decisions, the principal obligor had an apparent implied authority to fill up the blank, and the blank was filled by his direction.*

"The obligee was justifed in assuming, and acting upon the assumption, that Gage really possessed the authority with which he was apparently clothed. Knowledge of the unfilled blank for the penalty was but knowledge of the implied authority to fill it; and consequently could be no ground of suspicion of the lack of authority. The imperfection upon the face of the bond which is to have the effect of the notice contended for, must, as we regard, be of such character, that it points toward, indicates, and excites suspicion of the particular matter of defense alleged against the instrument, and as an ordinarily prudent man, to put the obligee to make inquiry as to the existence of the very thing which is set up in defeat of the instrument —as in this case, the condition of the limitation of the penalty to $250,000. * * *

"The bond signed and sealed by the sureties was presented by Gage to the common council as his required official bond. The common council were not to suppose that the sureties had done a mere idle thing, or that they were dealing deceitfully with the council in tendering this bond for their acceptance, and having in reserve a secret understanding which should nullify the bond. But they had the right to think the sureties meant honestly, and intended that the instrument they had signed should be accepted as, and serve for, the official bond of Gage. And although there were the unfilled blanks in the instrument, they saw that Gage had implied authority to fill them in such appropriate manner as might be necessary to make it such that it would be accepted by the common council as Gage's official bond as city treasurer, as they were so informed by decisions of the highest courts in the land. *Of course then the blanks in the bond were no indication of the want of authority, and could not put the obligee upon inquiry as to its existence."* (Our italics).

The case last cited effectually disposes of the suggestion

of the trial court that the mere existence of the blanks in the powers of attorney were notice to appellant Cobban of a defect in the authority and the alleged agreement that payment should precede delivery of the title papers. The secret understanding between appellee and Campbell and Benson, in the case at bar, corresponds to the secret understanding in the Illinois case, that the penal sum should not exceed $250,000. In neither case was there anything to put the other party on notice as to the existence of the secret agreement.

In Clemmons v. McGeer, (Wash.) 115 Pac. 1081, the Court said:

> "Appellants executed the deed with the name of the grantee left blank. In this condition it was delivered into the hands of Bell by appellants, upon his promise to produce the receipts showing payment for material furnished and work upon the building to the extent of the value of the land. Bell then inserted the name of respondent in the deed as grantee and delivered it to him for value; whether as a mortgage to secure a loan or an absolute conveyance we need not now determine. There is no allegation of any knowledge on the part of respondent as to the manner in which Bell acquired possession of the deed, nor of fraud of any nature on the part of respondent indicating that he was other than an innocent purchaser or mortgagee of the land. The possession of the deed by Bell was such prima facie evidence of its delivery as we think entitled respondent to assume that it had been delivered to Bell for the purpose of conveying title to the land. Richmond v. Morford, 4 Wash. 337, 341, 30 Pac. 241, 31 Pac. 513. Now had Bell's name been inserted in the deed at the time it was executed by appellants, and had Bell then conveyed by deed of his own to respondent, clearly respondent would have acquired an interest in the land as an innocent purchaser or mortgagee. It seems to be well settled that a deed

in which the name of a grantee is left blank and otherwise lawfully executed will vest title in a person whose name is subsequently inserted therein by one having authority from the grantor to do so. *In this case we think the authority of Bell to insert respondent's name in the deed as grantee must be determined from the view that the respondent was entitled to take of Bell's authority from the fact of Bell's possession of the deed.* The Supreme Court of Iowa in the case of Hall v. Kary, 133 Iowa, 465, at page 468, 110 N. W. 930, at page 931 (119 Am. St. Rep. 639), dealing with the question of this presumption of authority of one in possession of a deed with a blank for the insertion of the name of a grantee, said: 'It appears beyond controversy that plaintiff left the instrument which had been thus executed by him and his wife with Chamberlain, and accepted and retained possession of a conveyance of property in exchange for that in question; and it must be presumed that, although plaintiff's deed was blank as to grantee, the intention was to vest Chamberlain with title to the property described therein, and authorize him to insert the name of a grantee as he should see fit. That a deed thus left blank as to the grantee, being otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance is well settled in this state.'" (Citing cases). (Our italics).

Other cases on implied authority to fill blanks in deeds, bonds, powers of attorney, and similar instruments are cited supra under "Points and Authorities." The same rule is established by a multitude of cases in reference to negotiable instruments, and as it is rested on principles of agency those cases are equally applicable here.

In Cox. v. Alexander, 30 Ore. 438, 46 Pac. 794, the Court said:

"But, where a promissory note is issued with a blank

> for the payee's name, a bona fide holder thereof may, within a reasonable time, fill the blank by inserting his name therein, and thus give certainty to one of the essential requisites of such instruments. Thompson v. Rathbun, 18 Or. 202, 22 Pac. 837. The authority of the holder of a promissory note to supply the omissions therein, and insert his name as payee thereof, rests upon the doctrine of agency. The maker of a note, by omitting to name the payee therein, impliedly invites a bona fide holder thereof to supply the omission and give certainty to the contract; and this implied power renders a bona fide holder the agent of the maker, and confers upon such agent authority to supply any omissions in the instrument that are not inconsisted with the terms of the contract."

See also, Angle v. Insurance Co., 92 U. S. 330, 23 L. Ed. 566, and cases cited supra under "Points and Authorities."

Numerous cases involving parol authority to fill blanks in deeds and similar instruments have also been cited supra under "Points and Authorities" and it is submitted that these cases are strictly analogous to the case at bar.

Under the cases above cited, it is clear that authority to fill blanks in powers of attorney may be implied from the fact of their being in the possession and control of some person other than the principal, that this authority may rest to some extent on custom and usage, and that the existence of such blanks does not put one who gives value for the instrument upon inquiry as to the precise extent of the authority or secret limitations upon it.

In the case at bar appellee certainly intended to give some one authority to fill these blanks. The papers were fully executed and acknowledged, except for the blanks, and as soon as Benson paid the $3.80 per acre into the Anglo-California Bank, (if the evidence be held to show that an escrow was contemplated), he was entitled to absolute con-

trol of them. Upon such payment he would have been clearly authorized to fill out the blanks himself, or to allow some other person to do so, because appellee would have lost all interest in the matter. His actual authority was therefore to fill out the blanks on payment, but it was the *apparent authority* upon which appellants Cobban and Weirick were entitled to rely, and there was no notice of any secret limitation that payment was a condition precedent to the apparent authority becoming effectual. Appellee had clothed Benson with the indicia of authority as to these papers. Either through her carelessness or that of her agent Campbell, she had given him full control over the powers of attorney and other papers, and the only limitation was the secret one in regard to payment. It requires no citation of authority to show that a third person is entitled to rely upon the apparent authority given an agent by his principal, and this is clearly so where the third person has paid money on the strength of an authority inferred from the possession of the principal's property by the agent.

Benson was an established dealer in scrip. He quoted Cobban a price of $4.00 per acre, which was the then going market price. Cobban ordered the scrip by mail or wire, as needed in the usual course of business, paying for the same at the banks in Boise or Butte as the case might be, to which the scrip was sent by Benson for delivery upon payment by Cobban of draft attached (Tr. 259-260). When Mr. Cobban paid for the scrip he received the usual papers executed in the usual manner with the name of the attorney in fact and the land to be selected in blank, which was customary in the scrip business, and was in fact the only practical way of marketing scrip.

When Cobban paid the draft attached to the papers the scrip or selection rights became his property, and he and not the seller or former owner of the base lands, was there-

after the sole person interested in the selections that would be made and the prices and terms upon which the lieu lands should be sold. The purchase by Cobban was really not a purchase of the lands to be selected, but a purchase of the *right* of selection—a right which had accrued under the Act of Congress of June 4, 1897, authorizing lieu land selections upon the conveyance by appellee to the Government of the base lands. This conveyance had been made several months, or a year prior to the purchase of the scrip by Cobban, and the abstracts of title to the base land which accompanied the scrip and were a part of the papers purchased, showed: (1) a deed to the base lands from appellee, duly recorded in the county recorder's office of the proper county in the state of California, conveying the same to the Government, and (2) that the title stood in the Government, free and clear of any and all encumbrances. Such conveyance to the Government gave appellee the right to select lieu lands, and it was this right that Cobban purchased. The exercise of the right or the making of the selection in the name of appellee was merely a fiction in order to comply with the regulations of the Land Department. It was a case where the principal had no beneficial interest in the selection or in the agency. The agent, Cobban in this case, was in fact the principal, but in order to receive any benefit from the right which he had purchased and paid for he was required to make the selection nominally as agent or attorney in fact for appellee, when in truth and in fact appellee had no interest whatsoever in the selection. It is of no importance therefore that appellee did not know Cobban. It was wholly immaterial to her whether he was white or black, competent or incompetent, for the special right or agency which he was exercising in her name he had purchased and paid for and it was his property and not hers. It was for Cobban to determine after he had paid for the scrip who should be the

agent to make the selection, and who should fix the price and terms for which the property selected should be sold.

That there was implied authority at least to fill in the blanks cannot be denied, otherwise the scrip purchased would have been of no value. And the law will presume that the seller upon receiving the money for the scrip intended that the purchaser could insert the name of the agent, for without such authority the scrip was valueless. The trial court failed to note the vast distinction between the rule which controls the filling in of blanks in instruments such as we have in this case and the rule which has by some courts been applied where the name of a grantee has been inserted in a deed without authority from the grantor. When the true relation between the attorney in fact and the nominal principal in a scrip selection, (where the attorney in fact has purchased and paid for the scrip), is clearly understood no authority can be found supporting the proposition that the insertion of the name of the agent without the knowledge of the nominal principal invalidates the document.

In this case appellee occupies the inconsistent position of ratifying the agency in part. She ratifies the selection of the land and the insertion of the name of the agent and description of the land in the powers of attorney used as the basis for the selection, but repudiates that part of the transaction which authorized the agent to convey.

The act of an agent cannot be ratified in part and disaffirmed in part. The ratification is *in toto* for the law will not allow a principal to claim that which benefits him and repudiate the rest.

Rader v. Maddox, 150 U. S. 128, 37 L. Ed. 1025.
Egbert v. Sun Co., 126 Fed. 568.
Sutherland v. Ill. Cent. R. Co., 81 C. C. A. 620, 152 Fed. 694.

Clark & Skyles, on Agency, Sec. 108.
2 Enc. L. & P. 862, and numerous cases cited in the notes.

Appellant, The Payette Lumber & Manufacturing Company Purchased for Value and Without Notice, and Took the Legal Title Wholly Discharged From the Claims and Equities of Appellee.

Appellant, The Payette Lumber & Manufacturing Company, claims title to the lands in question on the ground that it had purchased them at $8.55¼ per acre in entire good faith, without notice, actual or constructive, of any defect in the title or of any equities of appellee, and in reliance upon the perfect record title of appellant Weirick as Trustee. The consequences of such a bona fide purchase are well illustrated by the case of Guthrie v. Field (Kan.), 116 Pac. 217, the facts of which closely resemble those of the case at bar. There Guthrie brought suit to quiet title on the following state of facts: He had delivered to one Field a warranty deed, executed and acknowledged, but with a blank for the name of the grantee. Field was to find a purchaser within thirty days and on collecting $2,000 for Guthrie was to fill in the name of the buyer and give him the deed. After the thirty days a stranger brought the deed to Guthrie with the grantee's name still in blank, and Guthrie declined to fill it. A day or two later the deed was filed for record, containing the name of the Osage Livestock Company as grantee, and later one Riffie purchased for value and without actual notice from the Company. The trial court found that the Osage Company had actual notice of the violation of authority, and plaintiff contended on the appeal that, as the authority had not been pursued, the deed was void and conveyed no title. In answer to the contention that only Field could fill in the blank, the Court said:

"The modern and, as we think, the better rule is that authority may be given by parol to insert the name of a grantee in a deed, even after delivery, and such authority may be implied from the circumstances. 2 Cyc. 159-160, 168-172; 3 Cyc. L. & P. 431-435. We do not regard it as material by whose hand the blank is filled. If Field had complied with his instructions in all other respects—if he had collected the $2,000 and remitted it to Guthrie—the fact that a representative of the Osage Live Stock Company, instead of Field, wrote in the name of the corporation, after the expiration of the 30 days, would hardly be deemed a sufficient ground to avoid the deed."

In discussing the rights of Riffie the Court said:

"It follows that under the evidence and findings the deed did not pass title; that as between Guthrie and the Osage Company it could have been set aside. Riffie, however, stands upon a different footing. Either he or Guthrie must suffer by the wrongful act of Field. Riffie has been diligent throughout. His conduct has been that of the ordinary business man. He had no reason to suspect any irregularity and no means of ascertaining the real facts except by making an unusual investigation for which there was no apparent occasion. Guthrie on the other hand, by intrusting Field with the blank deed, gave him the power to make a perfect record title in any one he might choose. Guthrie intended that Field should fill in and deliver the deed, but only upon certain conditions. Guthrie reposed confidence in Field that he would act in accordance with his instructions, knowing that, if he did not, some innocent person might be misled. Field delivered the deed contrary to his instructions, and the consequence followed that might have been anticipated if he were to prove unfaithful—a stranger to the transaction parted with his money having every reason to suppose he was obtaining a good title. Under these circumstances, the loss must fall upon Guthrie rather than upon Riffie."

Then, after quoting with approval from 3 Enc. L. & P. 440-442, 445, the Court said:

> "An obvious distinction is to be noted between depositing a completed deed to be delivered upon conditions, and intrusting to another a paper which at his will may be converted into an instrument, attested as genuine by the real signature and acknowledgment of the grantor, purporting to convey the property to any one the holder may select. One who arms another with such an uncontrollable power must know that, if his chosen agent shall prove dishonest, that it is likely to happen which in fact happened here, and, if such result follows, it must be regarded as the consequence of his own imprudence. In acknowledging a blank conveyance before an officer, a grantor in effect declares it to be a deed, which it is not, so long as its terms are incomplete. Having purposely put forth his solemn declaration that he has signed the instrument as a complete deed, when he has not in fact done so (expecting the custodian to find a purchaser, fill in the blank, and effect a transfer of title), he is answerable for the consequences if another innocently suffers loss through relying upon such assurance, and he cannot avail himself of the plea that a blank deed is no deed."

This decision it is submitted is sound in theory and conclusive of the case at bar, which is, if anything, a stronger case for the innocent purchaser. Here appellants Cobban and Weirick gave full value for the right to select the lieu lands, and they certainly had no actual notice of any agreement between appellee and Benson limiting their authority in any way, and as shown above they could not propertly be charged with constructive notice.

Appellant Company purchased in reliance on a perfect record title, without notice, actual or constructive, of any claims or equities of appellee, and it is submitted took the

title absolutely discharged from any such claims or equities.

It may be contended, however, that appellant, The Payette Lumber & Manufacturing Company, had constructive notice of the rights of appellee, and some of the observations of the trial court seem to indicate such an opinion. Thus, in declining to hold appellee barred by laches or estoppel, the court mentions the fact that the revocation of powers of attorney was executed by appellee January 3, 1903, and recorded in Boise County, Idaho, January 16, 1903, some five months before the conveyance from appellant Weirick to appellant Payette Lumber & Manufacturing Company (complainant's Ex. "T", tr. p. 503). This instrument reads in part as follows:

> "KNOW ALL MEN BY THESE PRESENTS, That I, Mollie Conklin, a widow of the City and County of San Francisco, State of California, do hereby wholly revoke, cancel and annul, any, all and every Power of Attorney, and any Authority of Agency of every description, of any kind or any nature, executed by me, or claimed to have been executed by me, and all that show, or claim to be irrevocable on their face, are cancelled and annulled *and denounced as fraudulent, particularly one given or in name of C. L. Hovey.*" (Our italics.)

It should be noted in the first place that this instrument describes appellee as a resident of San Francisco, while the powers of attorney describe her as a resident of Bakersfield, California (tr. p. 469). This variance alone should be sufficient to release an innocent purchaser under a power of attorney from Mollie Conklin of Bakersfield to R. M. Cobban, from the implication of constructive notice. But these powers of attorney were merely to convey certain parcels of land, and when that land had been conveyed by appellant

Cobban to appellant Weirick, as charged in appellee's bill and admitted by the answers, these instruments were wholly spent,—the agency was terminated by its own limitation, and this attempted revocation was both ineffectual and impossible. And as held in People v. North River Sugar Refining Co., 121 N. Y. 582, 9 L. R. A. 33:

> "The revocation of an authority after it has been executed cannot avail to annul the contract made in conformity thereto."

The only possible effect that this instrument could have if it had been brought to the actual notice of the appellant Company would have been to put it on inquiry to ascertain why the powers of attorney were "denounced as fraudulent;" but it is conceded that appellant Company never saw the instrument, so there is no question of actual notice. Constructive notice can certainly be no more extensive than actual notice would have been, and this instrument could not possibly be constructive notice of any defects in the title of appellant Weirick. Its operation was necessarily prospective. It failed to specify any person whose agency was revoked, except C. L. Hovey, although appellee and her attorney, Mr. N. E. Conklin, actually knew of Cobban's agency and the selection of lands in Boise County by him, and had at least constructive knowledge of the powers of attorney to convey, which had been recorded by him in that county. It was recorded long after the powers had been exercised, it was wholly outside of appellant's chain of title, and it alleged a fraud which four courts of record have emphatically found did not exist. See:

> Conklin v. Benson, (Cal) 116 Pac. 34;
>
> United States v. Conklin, 169 Fed. 177, 177 Fed. 55, and the opinion of the lower court in this case (tr. p. 499).

The Revocation of Powers of Attorney Did Not Operate as Constructive Notice to Appellant The Payette Lumber & Manufacturing Company.

The sections of the Idaho Code relative to recording transfers of real property which are pertinent here, are as follows:

> "Sec. 3149. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."
>
> "Sec. 3159. Every conveyance of real property, acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.
>
> "Sec. 3160. Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.
>
> "Sec. 3161. The term 'conveyance' as used in this chapter, embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills.
>
> "Sec. 3154. An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office.
>
> "Sec. 3162. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also asknowledged or proved, certified and recorded in the same office in

which the instrument containing the power was recorded."

The constructive notice to purchasers provided for by these sections extends only to instruments in the purchaser's chain of title, and the so-called revocation was not in the chain of title of appellant, The Payette Lumber & Manufacturing Company. On examining the records appellant Company found a patent from the United States to appellee and the Reddys, a power of attorney to convey the land so patented duly signed and acknowledged by these patentees, and a conveyance through the agency of appellant Cobban to appellant Weirick in pursuance of this authority. This showed a perfect title in appellant Weirick, and appellant company was not bound to search the record a single day or a single page after this last conveyance.

Appellant might be charged with notice of an actual revocation before the conveyance to Weirick, but how can it be charged with notice of a recital or allegation of fraud in a general revocation, filed months after? It should also be noted that the agency of appellant Cobban in this case was purchased for a valuable consideration and was therefore irrevocable, even by the death of the principal.

The construction of the recording laws in Idaho and other states is absolutely clear on this point. A party is only charged with constructive notice of such facts as a proper search of the record would disclose, and he is only required to search the records for instruments in his own chain of title.

In Harris v. Reed, 21 Ida. 364, 121 Pac. 780, a contract of sale to Reed was recorded, although defectively acknowledged. Reed assigned this contract to another and took a mortgage for the price, which mortgage was duly record-

ed. Harris purchased from the original owner without actual notice, had his deed recorded, and now claimed priority to the contract with Reed and the mortgage to him. The court discussed the recording acts fully and held that there was no constructive notice of the contract, because it was not entitled to record, and that there could be no constructive notice of the mortgage because it was not within the chain of title and the purchaser could not be charged with constructive notice of an instrument which was in no way connected by the records with the title of his grantor.

Ely v. Wilcox, 20 Wis. 423, 91 Am. Dec. 436, is a similar but much stronger case. Here one Matson deeded land to Ely and the deed was not entitled to be recorded because defectively acknowledged. It was recorded, however, and later Matson conveyed to N. G. Wilcox, who knew of the prior deed. Matson then gave another and proper deed to Ely, who recorded it; and after this recordation N. G. Wilcox conveyed to appellant T. D. Wilcox, who purchased for value and had no actual notice of either of the deeds to Ely. It was held that the first deed was not entitled to record and therefore gave no constructive notice, and that the second deed could not operate as constructive notice because T. D. Wilcox did not need to examine the records for conveyances by the original owner subsequent to the inception of his grantor's title. The court said, (91 Am. Dec. 439, 440):

> "In Massachusetts, it is held that in searching the title it is not necessary to search the record as against an antecedent grantor of the land further than the registry of a deed duly executed by him, and that when such a deed has been registered, a purchaser under the grantee will not be affected with notice of a prior deed recorded subsequently but before the per-

iod of his purchase: State v. Bradish, 14 Mass. 296; Trull v. Bigelow, 16 Id. 418 (8 Am. Dec. 144); Somes v. Brewer, 2 Pick. 184 (13 Am. Dec. 406). And the reason given is, that when a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further. The authorities are uniform to the effect that the registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed; and that a purchaser is not bound to take notice of the record of a deed executed by a prior grantee, whose own deed has not been recorded; and when the deed of a vendor is not recorded the record of a mortgage given by a vendee is not notice. There is great force in the reasoning which sustains the Massachusetts decisions. * * * No decision that we have been able to find has gone so far as we are asked to go in this case, to hold that a deed actually made, as well as recorded after the deed to a fraudulent grantee, is constructive notice to a purchaser from the fraudulent grantee to charge him with a knowledge of the title and equitable rights of the vendee in the last made and recorded deed. If we should so hold, then any vendor of land might, after he had conveyed to a *bona fide* purchaser, put on record a dozen deeds of the same land to different purchasers, and each of these would be a cloud upon the title. For these reasons we hold the record of the deed of January 23, 1856, to Ely, not notice to the appellant."

In McLanahan v. Reeside, 9 Watts 508, 36 Am. Dec. 136, an agreement to convey land reciting that the notes given for the purchase price were to "be chargeable on the land and be considered a lien and in the nature of a mortgage," and an absolute warranty deed in fee of the same land between the same parties, and not referring to the agreement in any way, were recorded on the same day and

in the same book known as the "Deed Book." Plaintiff obtained judgment against the grantee in this deed and the land was sold. The grantor now claimed priority as mortgagee under the recorded agreement. In holding that the judgment creditor was not charged with constructive notice of the mortgage, the Court said:

> "This case is not exactly like Friedley v. Hamilton, 17 Serg. & R. 70 (17 Am. Dec. 638), in which a recorded conveyance and an unrecorded defeasance, constituting an unrecorded mortgage betwixt the parties, were postponed to a subsequent judgment. But though both have been recorded in this instance, the principle applicable to them is the same. They were recorded in the same volume, on the same day, and though it does not expressly so appear, most probably in juxtaposition. *But a creditor in search of a clew to the title, would necessarily stop at a conveyance absolute on the face of it, and referring to nothing beyond it.* He would have no reason to suspect that further search would lead to a defeasance of which, not lying in the channel of the title, he would not, though actually recorded, be bound to take notice; as was held in Woods v. Farmere, 7 Watts, 385 (32 Am. Dec. 772); *for a purchaser of a regular chain of title is not bound to notice a thing which is not ostensibly attached to any part of it,* as in Ripple v. Ripple, 1 Rawle, 886, where a charge by the will of a devisor who had purchased by articles for his son, to whom the land was conveyed by the original owner after the testator's death, was held to require actual notice of it, in order to affect a purchase under a judgment against the son. The difference betwixt that case and the case at bar, is that here the incumbrance is of record, and there it was not; but according to Woods v. Farmere, if the record of the incumbrance lay not in the creditor's way, he was not bound to notice it." (Our italics).

In Blake v. Graham, 6 Ohio St. 580, 67 Am. Dec. 360, the Court said:

> "These rules rest on the obvious reason that a searcher can be fairly supposed to be made acquainted with the contents of such deeds only as, in the process of tracing, link by link, his chain of title on the record, necessarily pass under his inspection."

In Ford v. Unity Church Society, 120 Mo. 498, 23 L. R. A. 561, Mrs. C. purported to convey a fourth interest in a piece of property to one Ford before she acquired title, and this deed was recorded. Subsequently she acquired title and then conveyed to the predecessors of defendant. All the deeds in defendant's chain of title were properly recorded and Ford's successor tried to charge these parties with constructive notice of the original deed to Ford. It was held that the prior deed was not in the chain of title, and that no constructive notice could be imputed to defendants. The Court said:

> "Now, as to the second purchaser,—one who buys after the vendor acquires a title. He searches till he finds the deed to his vendor, and traces the title back to its source. He finds it regular, and that since his vendor acquired the title he has not conveyed to any one else. He is not expected to look for conveyances from his vendor prior to the time the vendor acquired the title."

Other cases are cited *supra* under "Points and Authorities."

It is thus clearly shown that no constructive notice to appellant The Payette Lumber & Manufacturing Company of any defect in the title can be implied from the recording of this instrument which was wholly outside of its chain of title. When appellant had examined the records

and found the power of attorney to convey and the conveyances to appellant Weirick and had found that there was no attempted revocation of this power prior to the dates of such conveyances, its duty was fully discharged and it could not be affected in any way by the recording of any subsequent instruments by appellee purporting to revoke these powers of attorney or to indicate that they were fraudulent or unauthorized.

The Trial Court seems to intimate at page 517 of the record that the fact that the administrator and administratrix of the estate of Patrick Reddy executed these powers of attorney, puts appellants Cobban and Weirick on inquiry to ascertain whether they had any authority to designate an agent to convey lands in Idaho, and that as inquiry *might* have led to a full disclosure of all the facts, appellants Cobban and Weirick were charged with notice of everything to which such inquiry might have led. The Reddy estate however, has never made any objection to the method of handling this scrip. On the contrary, its representatives received $10,400.00 from Benson after notice of the existence of these powers of attorney and all the facts in connection with the exchange. It should also be remembered that appellee and the representatives of the Reddy Estate had no beneficial interest in the right to select lands in lieu of the Monache lands because this right was purchased by appellant Cobban and their interest was at most a claim to the bare legal title under the patents from the Government. This inquiry, therefore, could not possibly have led to appellee and her unfounded claims of fraud in the original execution of these powers of attorney.

Furthermore, when appellant, The Payette Lumber & Manufacturing Company, purchased, the powers of attorney had been recorded for about two years and there was

nothing on the record prior to the conveyances from appellant, Cobban, to appellant, Weirick, to show that either the appellee or the heirs or devises of the Reddy Estate had made any objection to the exercise of these powers of attorney. After this lapse of time, surely, the appellant company was entitled to rely on the facts shown by the record without any further inquiry as to the right to create this agency.

This same contention was made by appellee in this Court in United States v. Conklin, 177 Fed. 55, and before the Supreme Court of California in Conklin v. Benson, 159 Cal. 785, 116 Pac. 34, but was by both courts considered immaterial, as the Reddy estate was not making any complaint that the agreement of August, 1900, had not been carried out in every detail, and there can be no presumption that inquiry to the representatives of that estate would have brought any information as to the grievances of appellee.

Appellants Are Not Affected by Escrow of Papers in San Francisco.

There is some vague testimony in the record to the effect that the money should be paid by Benson through the Anglo-California Bank. This, appellee contends, meant that the papers should be deposited in escrow and that Benson, as purchaser, should be entitled to the deeds upon payment of $3.80 per acre, and that the deeds were to be made out to Benson as grantee. That Benson was not to be the grantee is clear from the evidence and the surrounding circumstances. The deeds were actually made out to the United States and so read when they were signed by appellee. The District Court, however, fell into the error of assuming that it must have been the intention that the deeds to the United States were to be deposited

in escrow with the Anglo-California Bank, to be delivered only upon payment by Benson of the amount above stated.

This was not the understanding of Mr. Benson as is clearly apparent from his letters concerning the transaction (tr. p. 476, Exhibit "N-1"), and from his own testimony. It is also clearly inconsistent with the surrounding circumstances, particularly the Act of June 6, 1900, which took effect on October 1, 1900, and which limited the application of Monache and other forest reserve scrip to surveyed land.

All parties were apparently endeavoring to clear the title to the property and secure the execution and recording of the deeds so that the Monache lands might be conveyed to the Government prior to October 1, 1900, thereby adding to the value of the scrip or its salableness. The agreement which was reached in Mr. Campbell's office in August, 1900, was undoubtedly made with the view of taking advantage of the Act, and this had to be done within some six weeks after the agreement was reached.

These important surrounding facts and circumstances were entirely overlooked by the District Court. The papers were never deposited in escrow, but the court said that "the power of Campbell was analagous to that of an escrow holder. The understanding was that he should make a deposit of the papers in escrow, and, having failed to comply with that understanding, he must be deemed to have retained them in substantially the capacity of an escrow depositary; certainly his authority to deliver was no greater than would have been the authority of the Anglo-California Bank if, in accordance with the agreement, it had received them under the stipulated instructions." (Tr. 514.)

The Court erroneously assumed, apparently without examining or considering the question, that

Campbell's authority to deliver the papers was no greater than would have been the authority of the bank if the parties had actually deposited the papers in the bank with clearly defined instructions as to the terms of delivery. Campbell had never been agreed upon as an escrow holder. Appellee has contended throughout that he was her agent and attorney and if so he could not hold the escrow. She received the papers from the messengers which she assumed came from Mr. Campbell's office, and she delivered them to messengers from Mr. Campbell's office after they had been signed. She claims that she was relying upon Mr. Campbell and considering him as her agent. Campbell, on the other hand, disavows the agency and disclaims acting for appellee in any capacity. He did not consider himself escrow holder and did not know that he occupied such a position, and it would seem that he could not be charged with a duty or responsibility of which he was not aware. The papers were not held in escrow by Mr. Campbell, and it was never agreed or intended they should be deposited with him as escrow holder. But assuming for the sake of argument that he did in fact hold the papers in escrow, and that his instructions were sufficiently definite so that any one could say when he complied with and when he violated the terms of the escrow, we still insist that there is no authority for the proposition that a deed delivered under such circumstances by an escrow holder, (and appellee claims it was only the deeds that were to be deposited in escrow), does not, as against an innocent purchaser who has neither actual nor constructive notice of the unauthorized delivery, pass title.

It should be noted here that the deeds which were to be placed in escrow were those conveying the Monache lands to the Government, and the District Court found that ap-

pellee by bringing this suit ratified the delivery of such deeds.

The Supreme Court of Indiana in Quick vs. Milligan, 108 Ind., 419, had before it a case where the grantor was infinitely more careful than was appellee in the case at bar. In that case the grantor sent the deed by mail to her sister with instructions to deliver it to the grantee only upon condition that he paid the amount of the purchase money, and not to deliver it until the money was paid. The deed was delivered by the escrow holder on the false and fraudulent representations of the grantee that he would immediately mortgage the land and thus obtain money to pay for it. The grantor knew nothing about the deed having been delivered. As soon as the deed was recorded the grantee, being in possession of the land, sold it to a third person who had no notice of any fraud in securing the deed from the escrow holder. The grantor brought suit to recover the land on the ground that the deed passed no title as it was wrongfully taken out of escrow. The Court reviewed the authorities on the relation of the escrow holder to the parties and the effect of the wrongful delivery of the deed upon both the grantor anl the innocent purchaser. In discussing the principle of law that as between the grantor and the grantee no title passed by delivery of the escrow in violation of the instructions, the Court said:

> "If this proposition is broad enough to cover the case, the appeal must be sustained; but we cannot grant this essential requisite, for there remains the question of estoppel. It might be conceded that in ordinary cases, where the grantor remains in possession, the delivery of a deed, by one who receives it as an escrow, in violation of the conditions upon which he was authorized to deliver it, would not make the

deed effective to convey title, and yet there might be circumstances which would estop the grantor from asserting title against the *bona fide purchaser.*"

The Court quotes from Dickerson v. Colgrove, 100 U. S. 578, as follows:

> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

Many authorities are cited by the Indiana Court, and further on its decision it says:

> "The wrong constituting the legal fraud is the repudiation of what the conduct of the party has made appear true, to the injury of another, who in good faith has acted upon an apparent state of facts created by the conduct of the person who makes the denial of what his conduct implies. Negligence may sometimes constitute legal or constructive fraud, as is well illustrated by the forcible opinion in Stevens v. Dennett, 51 N. H. 324, where it was said: 'Thus, negligence becomes constructive fraud, although strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and gross negligence may be deemed compatible.'
>
> "There is another principle applicable here, and that is this: Where one of two innocent persons must suffer, he must be the sufferer who put it in the power of the wrong-doer to cause the loss, or as it has been said: 'He certainly who trusts most ought to suffer most.' Where one of the two innocent parties must suffer, he through whose agency the loss occurred

must sustain it. Le Neve v. Le Neve, 3 Atk. 646; New v. Walker, 108 Ind. 365; Hunter v. Fitzmaurice, 102 Ind. 449.

"It is also a familiar principle that where one is in possession of land and has a deed of record, the possession will be referred to his deed, unless there are facts known to one who is about to acquire an interest in the land indicating a different possessory right. 1 Washburn Real Prop., Sec. 95. Possession is often presumptative evidence of title, and one who finds on record a deed duly executed and recorded may surely act upon the presumption that as the paper title and the possession coincide, the possession is under the deed. 1 Washburn Real Prop., Sec. 35.

"In discussing a question very similar to the one before us, Marshall, C. J., said: 'Titles which according to every legal test are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously constructed, if this principle were overturned.' Fletcher v. Peck, 6 Cranch 87, 133. This doctrine was unqualifiedly approved in Somes v. Brewer, 2 Pick, 184; S. C., 13 Am. Dec. 406.

"It is clear to our minds that these principles carry the case for the appellee, for it was the appellant who put it in the power of the wrongdoer to do the act complained of. She it was who suffered him to remain in possession of the land, and placed in another's hands a deed which gave to that possession the fullest and most complete *indicia* of absolute ownership. The purchaser found the vendor equipped with the most

potent evidences of ownership, for he had a recorded conveyance, and he had possession. There was nothing wanting to an absolute and perfect title so far as visible and ascertainable facts disclosed."

The Supreme Court of Pennsylvania, in Blight v. Schenck, 10 Penn. St. 285, had before it a case where it was claimed the escrow holder had wrongfully delivered a deed and the grantor sought to set aside the conveyance. The Court in that case said:

"But, granting the deed was deposited with Curtis, as an escrow, to be delivered only on the performance of a special condition, and in violation of his instructions, he delivered the deed without exacting payment, does that avoid the title of the defendant who is a *bona fide* purchaser without notice? This is the next question. The first reflection which strikes us is that, if a title may be avoided under such circumstances, no purchaser is safe. This is a strong case, for here the defendant is an innocent purchaser for value. He invests his money on the faith of the solemn acts and declarations of the plaintiff. These acts and declarations are made before a magistrate, duly empowered for that purpose, certified to by him in proper form, duly recorded on the records of the county, which, by the act of 1715, is to have the same force and effect for giving possession and session, and making good the title and assurance of the law, as a deed of feoffment, with livery of seisen, etc. Moreover, it appears that, at the time of the purchase, the vendee was in the actual possession of the premises. There was, therefore, nothing to put him on his guard. *It must require a very strong case, as the plaintiff in error justly contends, to permit a grantor to aver against the confidence thus reposed in his acts and declarations, exactly the opposite of those acts and declarations to say, after acknowledging before the proper officer of the law that he delivered the deed, that he*

never delivered it, and having acknowledged that he received the purchase money, that he never received it."

In that case, as in this, the grantor's plea was the fact that he had not received pay for his land, and referring to that, the Court said:

"But his only equity is that he has not received his purchase money; *and, as the plaintiff justly contends, his equity is equal, for he has paid his purchase money.* But, where the equities are equal, as has been often decided, the legal title must prevail. It is a wholesome maxim of the law, that, where one of two innocent persons must suffer a loss, and a fortiori in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it. A party who enables another to commit a fraud is answerable for the consequences; so, if a party says nothing, but, by his expressive silence, misleads another party to his injury, he is compellable to make good the loss, and his own title is made subservient to the confiding purchaser. This is text law; Story's Eq. Secs. 388, 439; 1 Fonbl. Eq., b. 1, c. 8, Sec. 4, n.

"Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. *If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it,* except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority or may commit a wrong by acting knowingly contrary to them.

"But this principle must not be extended to a person who has no possible means of protecting himself, who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be. If the grantor is in-

jured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good."

In that case the Court held that the deed was not void, but was voidable merely as between the original parties to it. It said:

"It is not the case of condition, but the ordinary case of a breach of instructions, which at most makes the deed voidable, but not void.' The agent has the power to deliver the deed, and when he does not comply with his instructions, he becomes answerable to his principal. *If this principle be sound, the deed would be void by the omission to receive one cent of the purchase money, a proposition which would shock the common sense of every man."*

The Supreme Court of Maine in Hubbard v. Greeley, 84 Me. 340, had this same question before it and it held as did the Court above. It quotes with approval from the Supreme Court of Massachusetts:

"But the deed had been recorded, and the grantee had conveyed to an innocent purchaser for value, and the Court held that the title of the latter must be protected. It is a just rule, said the court, that when a loss has happened, which must fall upon one of two innocent persons it shall be borne by him who was the occasion of the loss, *even without any positive fault committed by him."*

Referring to escrows, the Court says:

"Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when in fact they have not been delivered. They clothe the grantees with apparent titles which are not real titles. Such

deeds are capable of being used to deceive innocent purchasers, and the makers of such instruments cannot fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it; and that in no other way can the public be protected against the intolerable evil of having our public records encumbered with such false and deceptive instruments."

The Supreme Court of California in Schultz v. McLean, 93 Cal. 329, uses substantially the same language in a case where a deed was delivered contrary to instructions. It quotes with approval from the Supreme Court of Pennsylvania the general proposition which is applied by the Courts in cases of this kind that "where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two that has accredited him ought to bear the loss."

In conclusion, we respectfully submit that the decree of the District Court must be reversed and set aside with directions to dismiss the bill, for the case of appellee is devoid of equity and the recovery was on a theory totally different from that upon which the bill was founded and the case was tried;

Appellee seeks equity without offering to do equity, and she was not required under the decree to do equity before she could recover. Appellants have for some twelve years paid annually the taxes levied against the lands of which appellee claims to be the owner. They have protected them against fire and other depredations, and greatly enhanced their value, but there is no provision in the decree for reimbursement for such expenditures.

Appellants are innocent in fact and innocent in law: They purchased without knowledge of the alleged secret limitations on Benson's agency—limitations which were wholly inconsistent with the apparent authority with which he was clothed; and appellants Weirick and The Payette Lumber & Manufacturing Company purchased for value, relying upon the title as shown by the records in the office of county recorder of the county in which the lands are situated.

Appellee is guilty of laches; She claims to have become apprehensive of Benson in the year 1901, and learned in December of that year that the Monache lands had been conveyed to the Government and the scrip sold to diverse and sundry persons. Yet, she commenced no action to protect her rights or to claim title to the property until September, 1905, after most of the witnesses familiar with the transaction had died.

She has ratified in part the acts of her agent but seeks to disaffirm the parts which are not to her interest.

She is clearly subject to the maxim, that where one of two innocent persons must suffer, he must be the one to suffer who put it in the power of the wrong-doer to cause the loss, or, as is sometimes said, "He who trusts most, ought to suffer most." If any wrong has resulted to appellee, it was caused by the acts of the agent whom she selected, and she and not appellants should bear the loss.

Respectfully submitted,

RICHARDS & HAGA AND
McKEEN F. MORROW,
Solicitors for Appellants,
Residence, Boise, Idaho.

No. 2236

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. M. COBBAN, E. B. WEIRICK, individually, and also as trustee, and the PAYETTE LUMBER AND MANUFACTURING COMPANY (a corporation),

Appellants,

vs.

MOLLIE CONKLIN,

Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

BRIEF FOR APPELLEE.

Statement of the Case.

This suit was commenced by the appellee on September 7, 1905, seeking the cancellation of certain alleged and pretended powers of attorney alleged to have been fraudulently procured from the appellee

in blank and fraudulently bearing certification of acknowledgment by notaries public and in which pretended powers of attorney the name of R. M. Cobban was inserted without the authority or consent of appellee after the alleged execution thereof; also for the cancellation of deeds executed by R. M. Cobban as attorney in fact for appellee to E. B. Weirick, as trustee, and for the cancellation of deeds executed by E. B. Weirick as trustee to the Payette Lumber and Manufacturing Company, a corporation. On April 15, 1908, an amended bill of complaint was filed by leave of court. The facts stated more in detail are as follows:

Prior to the year 1900 Alvah Russell Conklin, husband of the appellee, acquired title to approximately ninety-six hundred (9600) acres of land situated in Inyo and Tulare Counties, California, and referred to in the record and generally known as the "Monache" lands. Thereafter and prior to 1900 an undivided one-half interest in the "Monache" lands was conveyed by appellee's said husband to Patrick Reddy, brother-in-law of said Alva Russell Conklin, in payment for legal services in connection with litigation over the title to said lands. The said Patrick Reddy was a member of the law firm of Reddy, Campbell & Metson of San Francisco. Subsequently and before the year 1900, the "Monache" lands were included in the Sierra Forest Reserve under the Act of Congress of June 4, 1897 (30 Stats. 36). Land so included in a forest reserve could be by the owners conveyed to the United States and an equal area of

public lands outside the Forest Reserve selected in lieu thereof, the lands selected being generally known as lieu lands and the lands in the Forest Reserve conveyed to the United States, being generally known as base lands. To make such exchange, it was required that the owner execute a deed, conveying the base lands to the United States and have such deed recorded in the proper county recorder's office and thereafter file the same together with an abstract, showing clear and unencumbered title in the United States, in the United States Land Office, together with an application to select other specifically described lands in lieu of the surrendered lands. Under the regulations of the Land Department, the right to make selection of lieu lands was held to be non-assignable and therefore patents always issue for lieu lands to the grantors of the base lands (Transcript 495).

Alvah Russell Conklin died prior to the year 1900 and at all times during the year 1900, the estate of said Conklin was in course of probate, the appellee being the executrix of his estate and the firm of Reddy, Campbell & Metson being her attorneys as executrix, the appellee having settled with the firm of Reddy, Campbell & Metson for services as her said attorneys on June 6, 1900 (Transcript 469). The said Patrick Reddy died April 26, 1900, and thereafter the firm continued as Campbell, Metson & Campbell. On July 11, 1901, the firm of Campbell, Metson & Campbell procured an amended decree to be entered in the

matter of the estate of Alvah Russell Conklin, involving the base lands in Tulare County, California (Transcript 464, Complainant's Exhibit 5), and this was done entirely without the knowledge of Mollie Conklin.

After the death of Mr. Reddy, the firm of Campbell, Metson & Campbell, of which Joseph C. Campbell was a member, were the attorneys for the executor and executrix of the Reddy estate and said estate was at all times in 1900 in course of being probated. In 1900, John A. Benson, who was a land attorney of San Francisco, was a client of the firm of Reddy, Campbell & Metson. After the death of Patrick Reddy, John A. Benson entered into negotiations through Joseph C. Campbell of the firm of Campbell, Metson & Campbell for the purchase of the "Monache" lands, and in this connection, a meeting was held between Mr. Benson and Mrs. Reddy and Joseph C. Campbell in Mr. Campbell's office. Thereafter, Mrs. Reddy, the appellee, Mollie Conklin, N. E. Conklin, her son, John A. Benson and Joseph C. Campbell had a conference with reference to the sale of the "Monache" lands (Transcript 125-319-399), at which meeting the details of the sale were talked over and discussed and a net price of $3.80 per acre for the "Monache" lands agreed upon.

There is a conflict in the testimony as to the exact nature of this contract, the appellee's testimony being that the lands were to be sold Benson for $3.80 per acre, deeds to be placed in escrow

and not to be taken out until the money was paid, which was to be within ninety days (Transcript 126-127); N. E. Conklin, who was present at said conference testifying to the same facts (Transcript 201). Joseph C. Campbell testifies that the land was to be conveyed to the United States and was to be paid for at $3.80 per acre through the Anglo-Californian Bank, upon the approval by the Land Department (Transcript 320). The witness, Joseph C. Campbell, later in his testimony, and after a more complete examination of certain letters and records (Transcript 350), testifies positively that by the agreement, the titles of the selected lands were to be approved in the name of the appellee and the Reddy Estate and when so approved that Mr. Benson would have the right to purchase the same at $3.80 per acre but that the agreement was that the title was not to pass out of either the Reddy Estate or Mrs. Conklin until the lands were paid for (Transcript 351); that nothing was said at such conference and no agreement had for the making of any powers of attorney to sell lieu or selected lands (Transcript 350). Mr. Benson testifies that the powers of attorney to sell the selected or lieu lands were agreed upon at that time but in this he is contradicted by the appellee, N. E. Conklin and Joseph C. Campbell. By the agreement, Benson was to prepare the necessary deeds and papers which should be submitted for signature through Joseph C. Campbell.

The court found that the appellee's version of the understanding or agreement as to payment for the lands was correct (Transcript 512-513). Counsel for appellants in their brief, page 7, call attention to the Act of June 6, 1900, which became effective October 1, 1900, limiting the right of lieu land selections to surveyed land, and call attention to transcript 391-392, but there is no evidence to show that said Act was discussed between the parties. The relations of Mr. Joseph C. Campbell and the appellee are clearly shown by the evidence, by the findings of the court (Transcript 500) and by the amended decree (Transcript 464-465) and Complainant's Exhibit "B" (Transcript 468), to be that of attorney for the appellee as executrix of the estate of Alvah Russell Conklin.

After the meeting of the parties in August, 1900, John A. Benson prepared papers and the same were sent from Mr. Benson's office to Mr. Campbell's office to be executed by the representatives of the Reddy Estate and appellee. A messenger from Mr. Campbell's office took the papers to the residence of the parties where they were signed. The evidence shows that the appellee examined a few of the papers and finding them to be all right executed the papers sent to her by Mr. Campbell, relying upon his not sending any papers that were not proper. Appellee contends that the acknowledgments were false and that she did not acknowledge any of the papers before a notary public. The evidence shows that at the time the powers of

attorney under which the defendant, R. M. Cobban, conveyed the property, were purported to have been acknowledged in the City and County of San Francisco, the complainant was not within said county and city, but was at Bakersfield, California, and that she was in Bakersfield, California, from the 1st or 2nd of December, 1900, until August or September, 1901 (Transcript 140-141-192-193-234-301). And appellants have at no time asserted or contended, but by all of their testimony they attempt to show, that no papers whatever were ever executed before any other notary than Holland Smith, whereas nearly every power of attorney herein *purports to be executed before other notaries.* All the papers signed by the appellee were returned by her through messenger to the office of Mr. Campbell.

The defendant Benson testifies that he received all the papers through Mr. Campbell's office (Transcript 402-3).

Prior to the 19th day of February, 1901, a syndicate was formed, representing the parties shown in the transcript (244), of which the appellant, R. M. Cobban, was a member. This syndicate existed from prior to the 19th day of February, 1901, up to and including the 20th day of June, 1901 (Transcript 252). This syndicate was operating under an agreement by the terms of which the syndicate should furnish the funds to purchase lieu scrip; Mr. Cobban should act in the selection of the lieu

lands; after the approval of the selections, the lands were to be conveyed to the defendant, E. B. Weirick, trustee, for the use and benefit of the members of the syndicate (Transcript 252). The defendant, R. M. Cobban, conveyed to the defendant, E. B. Weirick, trustee, all the lands involved in this action and that such conveyance was made without any consideration and said Cobban was also a beneficiary (Transcript 252-253). During the course of the dealings between Mr. Benson and R. M. Cobban, acting for the syndicate, Mr. Cobban would wire Mr. Benson for scrip which would be forwarded to bank with sight draft attached and the papers delivered would consist of deed, surrendering the base lands to the United States, abstract of title to base lands, application to select lieu lands, powers of attorney to select lieu lands and powers of attorney to convey lieu lands, the record showing that in all cases the application to select lieu lands were blank as to the lands to be selected; that the powers of attorney to select lieu lands were blank as to the name of the attorney in fact and the lands to be selected, and that the powers of attorney to convey were blank as to the name of the person to be appointed as attorney in fact, and did not describe the lands to be conveyed; the appellants R. M. Cobban and E. B. Weirick, individually and as trustee, pleading in their answer (Transcript 88 to 98, inclusive), the form and effect of the several papers so delivered and admitting that the said powers of attorney although purporting to be signed

and acknowledged by the complainant and the rep-representatives of the Reddy Estate were blank as to the person to be appointed attorney under the power. That Cobban did pay to the bank for the use of Benson, the amount agreed upon and did insert or cause to be inserted in the said powers of attorney to select, and powers of attorney to convey selected lands, his own name as the attorney in fact (Transcript 259-261-270).

Mr. Cobban testifies that he did not know and never saw appellee (Transcript 260); that he was never authorized directly or indirectly by the appellee to insert her name in said powers or either of them (Transcript 270), but that he *assumed* or *considered* he was authorized (Transcript 271); that Mr. Benson in selling the scrip, did not show any authority, authorizing him to insert his name in any instrument executed and acknowledged by the appellee (Transcript 270-271); that he received the papers in blank and assumed a right to insert in such instruments such things as he thought necessary (Transcript 427). That in receiving such papers and making such selections, he was acting as agent for the syndicate, of which the R. M. Cobban Realty Company and others were members and of which he was a stockholder (Transcript 270-271). The selection of the land involved in this case was approved by the United States and was patented in the name of Mollie Conklin and Emily M. Reddy and Edward A. Reddy, administratrix and administrator of the estate of Patrick Reddy, deceased

(Transcript 157-158), and that the same lands were afterward conveyed by R. M. Cobban as attorney in fact for Mollie Conklin and Emily M. Reddy and Edward A. Reddy, administratrix and administrator of the estate of Patrick Reddy, deceased, under the said powers of attorney which had been signed in blank by the appellee and her co-owners, to the defendant, E. B. Weirick, as trustee (Transcript 497-498). Later, appellants Weirick and Cobban, acting for the syndicate, gave an option to purchase the lands to Mr. Musser or Mr. Deary, which was later assigned to the appellant, Payette Lumber and Manufacturing Company (Transcript 254). On the 19th day of May, 1903, the lands involved were conveyed by E. B. Weirick, trustee, to the Payette Lumber and Manufacturing Company (Defendant's Exhibit "A", Transcript 485). The appellee was paid through Campbell & Metson's office the sum of $2750.00 on account of the conveyance of the "Monache" lands, and the Reddy Estate was paid $13,000.00 (Transcript 392-395-423).

In December, 1901, N. E. Conklin was employed by his mother to investigate her matters in connection with the "Monache" lands, for the reason that she was getting no money from the same (Transcript 205). The letter from Joseph C. Campbell and the letter from John A. Benson to Mr. Campbell (Complainant's Exhibits "N" and "N-1", Transcript 475-478), show the steps taken by Mr. Conklin in the investigation of this matter.

That N. E. Conklin went to the county seat of Tulare County and investigated the public records and discovered the deeds of record, conveying the land to the United States. That he first learned that powers of attorney were in existence in July, 1902 (Transcript 214). That the first information that Mr. Conklin had or was able to obtain as to the existence of powers of attorney for the sale of lieu lands or selected lands was obtained in July, 1902, and that the powers of attorney so claimed were executed to C. L. Hovey of San Francisco (Transcript 224). That the first knowledge that any powers of attorney or any alleged powers of attorney were being used in the State of Idaho was obtained in October, 1903 (Transcript 225-226). That on January 16, 1903, Mollie Conklin filed in the office of the county recorder of Boise County, Idaho, a general revocation of all powers of attorney (Transcript 227-228). That such revocation was on file and recorded in Boise County for five months or more prior to the time that the deed was made by the appellant Weirick as trustee to the appellant Payette Lumber and Manufacturing Company.

The actual fraud perpetrated by John A. Benson upon the appellee is particularly shown in letter (Complainant's Exhibit "N", Transcript 476-478), in which he states that the lands had been selected upon the agreement that the parties in whose interest the same had been filed would pay the amount agreed *upon a deed conveying the rights of the owners* (Transcript 477). This letter

was dated December 11, 1901. The record shows that all the lands involved in this action had been paid for by the persons in whose interest it is claimed the same were located on and before the 20th day of July, 1901.

The appellee did not refuse to accept money from Benson until April, 1903 (Transcript 484, Complainant's Exhibit "U").

The District Court held that the papers executed by the appellee, being in blank, could not confer upon the appellant, Cobban, the power to convey (Transcript 509-512); that the papers were delivered to Mr. Campbell under such circumstances as to vest him with the powers analagous to that of an escrow holder, and that the complainant would not be bound by any act of the escrow holder in violation of his instructions in delivering the papers until the purchase price was paid (Transcript 512-516); that the papers involved were obtained by Mr. Benson by deception or through inadvertence of clerks in Mr. Campbell's office and that his acceptance and use of the same was a fraud upon the appellee (Transcript 517).

The District Court does not hold that the appellants Weirick and the Payette Lumber and Manufacturing Company are in fact innocent purchasers for value and the record does not disclose the facts that would place them in the position of innocent purchasers. Weirick by reason of his association with Cobban was a party to and is charge-

able with presumptive knowledge of the unauthorized acts of Cobban in the insertion of the name in the blank powers of attorney. Weirick took the deed as trustee without consideration and was designated in the deed as trustee. The conveyance of Weirick, trustee, to the Payette Lumber and Manufacturing Company was made by Weirick as trustee and the Payette Lumber and Manufacturing Company did not make any investigation as to the facts and circumstances under which Weirick was acting as trustee.

Points and Authorities.

Where the facts essential to entitle plaintiff to relief are averred in the bill and supported by the proof and the facts found as the basis of the decree are substantially the same as alleged in the bill, it is not a ground of error in the decree that the facts found in support of the decree vary in some important particulars from those alleged in the bill.

16 Cyc., 483;
Burr v. Botsford, 13 Conn. 146;
Campbell v. Ayres, 6 Iowa 339;
Jeanerett v. Radford, Rich. Eq., las (S. C.) 469;
Synott v. Shaughnessy, 130 U. S. 572; 32 L. Ed. 1038.

Where in a bill, fraud has been charged but other matters are alleged which give the court juris-

diction, the proper course is to dismiss only so much of the bill as relates to fraud and give so much relief as under the circumstances plaintiff may be entitled to.

Daniels Ch. Pr., 6 American Ed., Sec. 382.

When the facts and proceedings as to a transfer of title are fully disclosed in the bill and point to fraud and wrong, and equally to inadvertence and mistake if later be shown the bill is sustainable.

Williams v. U. S., 138 U. S. 514, 524; 34 L. Ed. 1026.

Possession by plaintiff in action to remove a cloud is not always necessary. Where the estate or interest is equitable the jurisdiction should be sustained whether plaintiff is in or out of possession.

When a party out of possession has an equitable title or where he holds the legal title, under circumstances that the law cannot furnish full and complete relief his resort to equity to have a cloud removed ought not be questioned.

Pomeroy's Eq. Jurisprudence, Vol. 6, Sec. 731;

Sayers v. Burkhardt, 29 C. C. A. 137;

Gage v. Kaufman, 133 U. S. 471; 10 Sup. Ct. 406;

Coal Co. v. Doran, 142 U. S. 417, 449; 12 Sup. Ct. 239;

Rich v. Braxton, 158 U. S. 375, 406; 15 Sup. Ct. 1006;

Harding v. Gince, 42 U. S. App. 411; 25 C. C. A. 352; 80 Fed. 162;

Christian v. Vaner, 41 W. Va. 753; 24 S. E. 596.

Under the statutes of the State of Idaho, any person having claim or interest in real estate may maintain action regardless of possession.

Sec. 4538, Revised Codes of Idaho;

Coleman v. Jaggers, 12 Idaho 125; 85 Pac. 894.

Section 4538, Revised Codes of Idaho, is identical with 738, Code of Civil Procedure of California, and the same rule has been followed in California.

People ex. rel. Lorr v. Center, 66 Cal. 551-6; 5 Pac. 263; 6 Pac. 481.

The federal courts have power and jurisdiction to enforce rights created and administer remedies provided by State statutes, for enforcement and administration in courts of the State, either at law or in equity.

Darragh v. Utter Mfg. Co., 23 C. C. A. 609;

Ex parte McNiel, 13 Wall. 236;

Cummings v. Bank, 101 U. S. 153, 157;

Trust Co. v. Krumseig, 23 C. C. A. 1; 77 Fed. 32.

An enlargement of equitable rights by State statute may be administered by National courts as well as courts of the State.

Darragh v. Utter Mfg. Co., supra;

Case of Broderick's Will, 21 Wall. 503, 520;

Clark v. Smith, 13 Pet. 195, 202;
Holland v. Challen, 101 U. S. 15-25, 3 Sup. Ct. 495;
Forst v. Spitley, 121 U. S. 552, 557; 7 Sup. Ct. 1129;
Reynolds v. Bank, 112 U. S. 405; 5 Sup. Ct. 213;
Chapman v. Brewer, 114 U. S. 158, 170, 171; 5 Sup. Ct. 799;
Gormley v. Clark, 134 U. S. 338, 348, 349; 10 Sup. Ct. 554;
Bardon v. Improvements Co., 157 U. S. 327, 330; 15 Sup. Co. 650;
Cowley v. R. R. Co., 159 U S. 569. 583; 16 Sup. Ct. 127.

A party going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of that locality.

Darragh v. Utter Mfg. Co., supra;
Ex parte McNeil, supra;
Davis v. Gray, 16 Wall. 203, 221;
Cowley v. R. R. Co., supra.

Where the statute of a State enlarges the ancient jurisdiction of courts of equity in respect to suits to quiet title but equitable rights remain, the enlargement thereof may be administered by the courts of the United States as well as by the State courts.

Divine v. Los Angeles, 202 U. S. 312; 50 L. Ed. 1046;
Broderick's Will, supra;

Holland v. Challen, supra;
Gormley v. Clark, supra;
Moore v. Steinbach, 127 U. S. 70-84; 32 L. Ed. 51-56;
Reynolds v. Bank, supra;
Chapman v. Brewer, supra;
U. S. v. Wilson, 118 U. S. 86, 89; 30 L. Ed. 110, 112;
Frost v. Spitley, supra.

A deed or other instrument affecting title to real estate passes no interest if it had no grantee, but authority to fill up blank may be given by "parol".

Allen v. Withrow, 110 U. S. 119; 28 L. Ed. 90;
Dewey v. Foster, 2 Wall. 33; 69 U. S. 781;
Swartz v. Ballou, 47 Ia. 188;
Van Ella v. Evenson, 28 Wis. 33;
Field v. Stagg, 52 Mo. 534;
Devlin on Deeds (3d Ed.), Sec. 456.

To make a deed or other instrument affecting title to real estate, executed in blank, operate as a conveyance of the property, it is essential that the blank be filled by the party expressly authorized to fill it, and this must be done before or at the time of delivery to grantee.

Allen v. Withrow, supra;
2 Cyc., 157;
Arguello v. Bours, 67 Cal. 447; 8 Pac. 49.

Where the execution of a deed is procured by deceit it is a forgery and the question of good faith does not arise.

McGinn v. Toby, 62 Mich. 252; 4 Am. St. Rep. 848;
Camp v. Carpenter, 52 Mich. 375;
D'Wold v. Hayden, 24 Ill. 525;
Griffiths v. Kellogg, 39 Wis. 293;
Devlin on Deeds, Sec. 228;

Where a deed has been surreptitiously and fraudulently obtained from the grantor without his knowledge or consent, no title passes whatever, and a subsequent purchaser is not protected.

Gould v. Wise, 97 Cal. 532;
Fitzgerald v. Goff, 99 Ind. 28;
Henry v. Carson, 96 Ind. 412;
Everts v. Agnes, (Wis.) 65 Am. Dec. 314;
Arguello v. Bours, supra.

Acknowledgment of power of attorney to sell was necessary before the deeds executed under powers could be recorded. Appellants relying upon recorded title cannot repudiate the forged and false acknowledgments appearing upon the record of the powers of attorney.

Revised Codes of Idaho, Sec. 2994;
Revised Statutes of Idaho, 1887, Sec. 2994.

Where recorded title is relied upon, and acknowledgment of the instrument was a condition precedent to such recording, there could be no

instrument to acknowledge until the blanks were filled and the instrument completed.

The act of the officer in certifying an acknowledgment to an instrument in blank is a nullity and the acknowledgment and blank instrument are no more than waste paper.

> Drury v. Foster, 2 Wall. 24 (U. S.); 17 L. Ed. 780.

A deed, signed and acknowledged leaving the grantee's name blank and afterwards filled in with a name which grantor did not authorize is void and is ineffectual as if an entire forgery.

> Burke v. Borns, 92 Cal. 112; 28 Pac. 57;
> Arguello v. Bours, supra;
> Vaca Valley R. Co. v. Mansfield, 84 Calif. 561; 24 Pac. 145.

Powers of attorney in connection with the sale of so-called "scrip" that are blank at the time they leave the possession and control of the maker are utterly void, and the subsequent filling of the blanks so as to make it appear to be complete, and valid, is a forgery.

> Puget Mill Co. v. Brown, 54 Fed. 987. Affirmed 7 C. C. A. 643.

The addition of the word "trustee" to the name of a person is notice of a trust and calls for some inquiry. An examination puts the purchaser upon

inquiry and is constructive notice of everything to which that inquiry would lead.

Mayberry v. Ehlen, 20 Am. St. Rep. 467;
Min. Nat. Bank of Parsons, 40 Am. St. Rep. 299;
Johnson v. Colman, 41 Am. St. Rep. 284.

Any knowledge of the existence of a fact tending to impeach or cut down the title of a vendor is sufficient to put a purchaser on notice and inquiry, and inquiry must be directed to ascertain the facts.

Bigelow Equity, Chapt. XI, page 182, Sec. 1; also Chapt. II, Sec. 1.

The doctrine of bona fide purchaser without notice does not apply to total absence of title in vendor. The good faith of a purchaser cannot create a title where none exists.

Dodge v. Briggs, 27 Fed. 160;
Hyde v. Shinn, 199 U. S. 83.

To invoke the doctrine of a bona fide purchaser there must be a genuine instrument having a legal existence as well as one appearing on its face to pass title. It cannot arise on a forged instrument, or one executed to no parties at all.

Hyde v. Shinn, supra.

To claim defense of bona fide purchaser for valuable consideration answer must allege the deed of purchase, date, parties and contents. That vendor was seized in fee and in possession. The consideration, and that it was bona fide and truly paid

independently of the recital in the deed. How the grantor acquired title, and notice denied previous to and down to the paying of the money and delivery of the deed.

Boone v. Childs, 10 Pet. 193;
Flagg v. Mann, 2 Sumn. 485-557.

Power of attorney was not a conveyance, and conveyed no powers coupled with an interest.

Hunt v. Rousmainer, 8 Wheat. 174;
Freeman v. Rohn, 58 Cal. 115.

Power of attorney may be revoked by filing revocation, acknowledged and recorded in the same office as the power.

Sec. 3162, Revised Codes of Idaho.

An agent with limited power cannot bind his principal when he transcends his power and a person transacting business with him on the credit of his principal is bound to know his authority.

Schunmelpennich v. Bayard, 1 Pet. 264; 7 L. Ed. 138.

An unauthorized delivery of deed does not operate to transfer title.

16 Cyc., 581;
Skinner v. Baker, 79 Ill. 496;
Berry v. Anderson, 22 Md. 36;
Harkreader v. Clayton, 56 Miss. 383; 31 Am. Rep. 369;
Tyler v. Cate, 29 Ore. 515-525; 45 Pac. 800;
Patrick v. McCormick, 10 Neb. 1; 4 N. W. 312;

Black v. Shriver, 13 N. J. Eq. 455;
Smith v. South Royalton Bank, 32 Fed. 341; 76 Am. Dec. 179;
Chipman v. Tucker, 38 Wis. 43; 20 Am. Rep. 1;
Balfour v. Hopkins, 93 Fed. 564; 35 C. C. A. 445.

A different rule applies to deed placed in escrow from that which applies to negotiable instruments.

Fearing v. Clark, 16 Gray (Mass.) 74; 77 Am. Dec. 394;
Provident L. etc. Co. v. Mercer Co., 170 U. S. 593-604; 42 L. Ed. 1156;
Devlin on Deeds, 3rd Ed., Sec. 322;
Balfour v. Hopkins, 93 Fed. 564; 35 C. C. A. 445;
Calhoun v. American Emigrant Co., 93 U. S. 124; 23 L. Ed. 826;
Knapp v. Nelson, 41 Colo. 447; 92 Pac. 912;
Tyler v. Cate, 29 Ore. 515; 45 Pac. 800;
Bradford v. Durham, 45 Ore. 1; 101 Pac. 897; 135 Am. St. Rep. 807;
Powers v. Rude, 14 Okla. 381; 79 Pac. 89;
Bowers v. Cottrell, 15 Ida. 221; 96 Pac. 936.

Argument.

Appellee in her bill of complaint charges in substance the following facts:

That a conspiracy was entered into between certain parties to induce the complainant to surrender

base lands and to select lieu lands and to sell said lieu lands and deprive appellee of the use of the same (Transcript 11-12). Then follows (Transcript pages 12-13), a detailed statement with reference to the transactions in August, 1900, in the presence of Campbell, Benson, the appellee and Emily M. Reddy, relative to the sale of the "Monache" lands. That by said agreement, Benson was to prepare the deeds in connection with the sale of said lands without expense to the complainant (Transcript 13). Said deeds when drawn and executed were to be placed in escrow (Transcript 14). That Benson prepared the deeds and submitted the same to the appellee and her co-tenants through Campbell (Transcript 15). That appellee, relying upon the promises of Benson and Campbell, signed the deeds and returned the same to Campbell and that Campbell delivered the deeds to Benson and caused the same to be placed of record (Transcript 15 and 16). That at the time said deeds were submitted for the base lands, that the complainant signed all the papers so submitted, relying upon and placing confidence in the fact that they were sent to her for signature by Campbell and believing that he would place the same in escrow (Transcript 16). That included within the papers sent her by Campbell for signature were applications to select lieu lands in place of base lands; papers purporting to be powers of attorney which were in blank, and that the said papers were signed by the appellee, as sent to her for signature by Campbell (Transcript

17). That neither Campbell nor Benson nor any other person informed appellee that she had signed deeds to base lands, conveying the same to the United States, and that appellee was never informed by Campbell or Benson or any other person that she had signed powers of attorney to convey lieu lands. That in July, 1901, complainant first ascertained that the deeds for the base lands had not been placed in escrow but that the same had been placed of record and that after ascertaining such facts, appellee was assured by Campbell that the matter could be taken out of Benson's hands at any time and that appellee further learned that the lieu lands were being selected in her name and that when patents issued to said lieu lands, the same would be issued in her name and in the name of the representatives of the Reddy Estate and her co-tenants (Transcript 18 and 19). That the powers of attorney specifically describing them were signed, if they were, by the appellee without her knowledge or consent and that the same were wholly blank at the time of their signature by appellee as to the name of the party appointed thereby as attorney in fact and that the name of R. M. Cobban had been inserted in each of said powers of attorney and the same recorded in Boise County, Idaho (Transcript 20 to 28, inc.). That the appellee did not know of R. M. Cobban, never received anything of value or consideration from him or anyone in his behalf and did not knowingly sign or authorize any person for her to sign said

alleged powers of attorney and that appellee never knowingly or consenting thereto gave a power of attorney to R. M. Cobban or to any other person to sell or dispose of or to exchange or otherwise deal in or deal with said lieu lands or any part thereof and that said alleged powers of attorney were wholly without consideration. That appellee never acknowledged said powers of attorney and never appeared in person or by proxy or otherwise before the notaries public or any of them, who appeared in said certificates of acknowledgment purporting to be annexed to said instruments. And that said acknowledgments were wholly false and untrue and were made without appellee's knowledge or consent and that said powers of attorney were false and forged (Transcript 28 and 29).

That no administration upon the estate of Patrick Reddy, deceased, had ever been had in the State of Idaho, which was known to appellants and each of them, and that said appellants and each of them well knew that neither Emily M. Reddy, as administratrix and Edward A. Reddy, as administrator, had any power whatever to make said powers of attorney or to appoint said R. M. Cobban or any other person their attorney in fact, to sell or dispose of said lieu lands (Transcript 29 and 30). That R. M. Cobban, as alleged attorney in fact, for the appellee and for Edward A. Reddy, as administrator and Emily M. Reddy, as administratrix, of the estate of Patrick Reddy, deceased,

purported to convey said lieu lands to E. B. Weirick, trustee (Transcript 30 to 33).

That no administration as to a portion of the Monache lands as to Mollie Conklin's interest had been had up to July 11, 1901, at which time it appears an amended decree was obtained, a copy thereof being discovered amongst Benson's papers (Transcript 433). Mr. Benson says he knew nothing about it, Mr. Campbell says that he knows nothing of it, and Mollie Conklin says she had no knowledge of it.

That after said conveyances and during 1902, the lieu lands were patented by the United States to appellee and Emily M. Reddy, as administratrix, and Edward A. Reddy, as administrator. That complainant did not know that said alleged powers of attorney were in existence or that said alleged conveyance to Weirick, trustee, was in existence prior to the 1st day of January, 1903. That the complainant immediately thereafter and prior to the 1st day of May, 1903, repudiated the said powers of attorney and said conveyance. That the total number of acres of base land which appellee made a verbal agreement to sell to said Benson was ninety-six hundred acres. Appellee received the sum of $2,750.00 through the office of said Campbell, which was an *advancement* and not a payment (Transcript 357). That appellee is ready, able and willing to restore to Benson and Campbell everything of value received by her from them. That

she has not done so or offered to do so because said Campbell and Benson have by their acts, as set forth in said bill of complaint placed it beyond their power or the power of either of them to restore the appellee to the position she occupied in relation to said lands and the title thereto prior to the conveyance of said lieu lands to Weirick (Transcript 35-36).

That Cobban, Weirick individually and Weirick as trustee, Payette Lumber & Manufacturing Co., claim an interest or estate in said lieu lands adverse to appellee and none of said parties has any rightful claim, right, title or interest thereto. That the said alleged powers of attorney and alleged conveyance to Weirick, trustee, are invalid and fraudulent and forged and constitute a cloud upon complainant's title to said lieu lands (Transcript 36). That by the prayer to her bill of complaint, complainant prays that defendants be forever barred and enjoined from all claim to any estate of freehold or of inheritance in said real property and that complainant be decreed to be the owner thereof and entitled to possession of the same; for a decree of the court adjudging said powers of attorney and said alleged deed to Weirick, trustee, null and of no effect; for the appointment of a commissioner by the court and that said commissioner be directed to make and execute to appellee a full and complete release, cancellation and annulment of said powers of attorney and that they be de-

clared false and forged and that said alleged deed to Weirick, trustee, be cancelled and annulled and for general relief (Transcript 37 and 38).

By the allegations of said bill (Transcript p. 3), it is alleged that the appellee is owner in fee, and as tenant in common, of an undivided one-half interest in said lands in said bill of complaint specifically described and is entitled to the immediate possession of said land; that said lands are not in the possession of complainant nor of defendants or either of them and that said lands on the contrary are vacant, unoccupied, wild and uncultivated timber lands and are not in the possession of any person.

Upon these charges, issues were joined as between the appellee and the appellants, and the appellants Cobban and Weirick, individually and as trustees, specifically alleged that they received from Benson and without inquiry powers of attorney to sell and convey lieu lands in blank and the specific method employed by them in the completion of said instruments, all of which allegations made in the answer of said appellants and as proved by them in the testimony offered on the trial of the cause, amply bear out and corroborate the allegations made by the appellee in the bill of complaint.

The court has specifically found direct fraud to have been perpetrated by Benson, and upon this point, the court finds (Transcript 499):

> "Moreover, there is no substantial foundation for the charge, elaborated at great length

in the bill, that Benson, Campbell, Weirick, Cobban and others, conspired to defraud the plaintiff. So far as Cobban and Weirick are concerned, together with their associates and the promoters and officers of the defendant, Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud, or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff. They purchased the scrip by mail in due course of business, were not acquainted with either Benson or Campbell, and had no knowledge of the facts of which the plaintiff now complains. While there is much in the record to support the view that Campbell failed to properly discharge his obligations to the plaintiff, it cannot be held that he conspired with Benson, or at any time entertained corrupt or improper motives. Such delinquency as in law may be properly charged against him is to be attributed to a want of personal attention upon his part, and either to his neglect to give definite instructions to his subordinates, to whom, in a measure, he intrusted the business, or to their disregard of his instructions, rather than to any design or willingness to wrong the plaintiff; I am satisfied that there was no evil intent. That Campbell owed some duty to the plaintiff cannot be controverted. She intrusted to his keeping the instruments of conveyance which were executed jointly by her and the representatives of the Reddy Estate, either because she regarded him as her attorney, or because, recognizing him as the attorney for the Reddy Estate, and reposing great confidence in him, she assumed that he would deliver the instruments only in accordance with the agreement, of the terms of which he was fully advised. Whether formally employed as an attorney or not, having, with full knowledge of

the conditions upon which they were to be delivered to Benson, received the instruments, it was his duty either to return them to plaintiff or to comply with such conditions. This, however, is not an action to determine Campbell's liability, nor is he made a party defendant, and therefore, the precise nature of his relation to the plaintiff is material only in so far as it bears upon the effect upon the plaintiff's rights, of the unauthorized and improper delivery of the instruments through his office to Benson, and by Benson to the defendants who purchased them for value and without knowledge of any wrongdoing. And in disposing of that issue, we may dismiss from our consideration all those instruments used merely in effecting an exchange of lands with the United States. Such are the deeds executed in favor of the United States, the application to select lands in lieu of those relinquished, and powers of attorney authorizing the making of such selections. This suit is based upon the theory that the plaintiff is entitled to the fruits of the exchange, namely, the lands patented to her by the United States in consideration of her relinquishment of title to the base lands, and therefore it may be held that, by prosecuting the suit, the plaintiff has ratified all proceedings relating to such exchange. There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney 'to convey' without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense,—whether the understanding was a transfer directly to Benson of the Monache lands or an exchange thereof with the Government, and thereupon a transfer of the lieu lands to Benson might designate,—according to all of the testimony, payment of the agreed

price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title, from the plaintiff. Such is the testimony of the witnesses for the plaintiff, Campbell, in the most emphatic terms, so declares, and Benson, in effect, admits that such was the understanding. It is true, I think, that when she signed the large number of documents sent to her from Campbell's office, the plaintiff acted without fully understanding their legal import, but even if it be held that, having voluntarily attached her signature, she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly nor impliedly did she authorize their delivery to Benson. Campbell testifies that it was not his understanding that such instruments were ever to be executed, and that personally he was wholly unaware of their existence until after this suit was commenced. He never saw them, and did not deliver them to Benson or authorize their delivery. Benson ventures no explanation and advances no theory in justification of their delivery to him. In some way, it does not appear just how, they all reached his office bearing false notarial certificates of acknowledgment, and came from either Campbell's office or directly from the hands of the notary public. The delivery was made either by the notary or a subordinate in Campbell's office, but whether such delivery was the result of fraudulent collusion or only innocent inadvertence, it was not in accordance with the original agreement, and had the authorization or consent of neither Campbell nor the plaintiff."

Again, at Transcript page 504, the court finds:

"At the hearing, counsel for the defendants, assuming that plaintiff had declined an offer of

full payment, earnestly insisted that it would be extremely inequitable to permit her to refuse substantially that for which she had contracted, and now recover title to these lands from the defendants, who have already in good faith made full payment, and I was inclined to regard such a view with much favor. But upon a most careful search of the record I do not find the assumption of tender well founded. At one point, the witness Campbell testified that the plaintiff refused further payments, but the statement is immediately qualified in such a way as to leave it practically worthless. Benson evidently seeks to leave the impression that plaintiff was unwilling to receive payment, but he seems studiously to avoid any direct statement to that effect, and clearly all of his testimony upon the point relates to a time long after he consummated the sales to, and received full payment from, Cobban. It is difficult to harmonize Benson's use of the powers of attorney and his conduct generally with the ordinary standards of honesty and fair dealing. In his letter of December 11, 1901, written to Campbell, in response to the latter's request for a report as to the status of the whole matter, he uses the following language: 'All of the land, except 400 acres, has been deeded to the United States, and deeds placed upon record, and selections made of other lands in accordance with the provisions of the Act of Congress of June 4, 1897 (30 Stats. 36).

" 'This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements, which in terms provided that after the land selected in lieu of the lands surrendered had been located and said locations had been accepted by the Commissioner of the General Land Office, and proper evidence fur-

nished thereof, that the parties in whose interests the locations were made, would, upon the delivery of a deed conveying the right of the owners, pay the amounts agreed upon.

" 'Up to the present date there has not been a single location accepted by the Commissioner of the General Land Office. It is my intention just as soon as these acceptances can be had to ask for a confirmation of the sales by the court so that settlements can be made to both the owners and the parties in whose interests the locations were made. We have been bringing every effort to bear to get the Commissioner of the General Land Office to act upon these matters, and as he has lately added several to the working force in his office, it is likely we will not have very much longer to wait.'

"Clearly, he thus intended to give the impression that the original owners still controlled the title, and that no money had been paid by the purchasers, and that payment would be made only upon the delivery of proper deeds by the original owners, whereas in truth the fact was that, months prior thereto, he had received, in installments, the full purchase price for the scrip covering all of the lands described in the bill, and had delivered to Cobban the several powers of attorney purporting to authorize the transfer of title from the plaintiff and the Reddys to unnamed purchasers. By implication the letter recognizes the correctness of the plaintiff's contention, that she was to convey title only upon receiving payment in full, and the fact was concealed that the instruments now under consideration were in existence at all. There were doubtless some negotiations looking to a settlement of the whole controversy, and not improbably Benson conditionally offered to make certain payments, but there never was an unconditional

or actual tender to the plaintiff of what was clearly due her upon account of the Cobban sales. From the record the inference is unavoidable that, if Benson had, during the year 1901, or during the larger part, at least, of the year 1902, offered to account for and pay over the moneys arising from the Cobban sales, he would have been met with no hesitation upon the part of the plaintiff in accepting payment, but, as appears from the letter above referred to, he was putting her demands for payment off by evasion and deception. After the plaintiff learned, through inquiries prosecuted by her son, in the year 1902, that her understanding of the agreement was being violated, and especially when it appeared that Benson had come into possession of, and had improperly disposed of, the powers of attorney to convey, not without reason she looked with suspicion upon, and was reluctant to accept, offers of partial payment. She had a right to know the facts, and this knowledge was denied to her. Benson declined to discuss the matter except through or with Campbell, and Campbell, for some reason, was very difficult of access."

Also at Transcript page 507, the court further finds:

"Not without some apparent reason, they doubtless entertained a suspicion that Benson and Campbell were in collusion for some purpose antagonistic to their interests, and that it would be useless, if not perilous, to advise them of such suspicion until certain facts had been learned from disinterested sources. While the course pursued is not free from criticism, it is not thought to be such as should debar the plaintiff from seeking relief in a court of

equity. It may be thought that the fact that the Reddys were paid much larger amounts than were paid to the plaintiff tends strongly to corroborate the theory that plaintiff refused to accept payment, but it seems that from time to time, Campbell, putting forward the needs of Mrs. Reddy for money, strongly urged Benson to make advances to her. Campbell testified that he understood that the moneys so paid were not the proceeds of sale, but were advanced from time to time by Benson, in anticipation of such sales, and in view of the statements contained in Benson's letter of December 11th, it is not improbable that from time to time he led Campbell to believe that, under the contract, there was nothing legally due from him, and that the payments which he made were to be understood as advancements only. In that view, Campbell was justified in turning over to Mrs. Reddy alone such sums as he received, for they were by Benson paid to her credit exclusively, whereas it was his duty to distribute equally between her and the plaintiff all proceeds arising from the sales of lands."

In this case, the complainant in her bill of complaint, has set forth the facts upon which she relies for recovery, not only the facts as to the fraud and conspiracy but the facts as they actually appear, and the court has found substantially that all the facts alleged by the appellee in her bill of complaint to be true, and the appellants certainly knew from the allegations of the bill, what charges they were called upon to meet and by their answer have placed in issue the very facts alleged by the complainant. At the time when Benson wrote the

letter to Campbell (Transcript 476-478, Exhibit N-1), being December 11, 1901, it clearly appears that he was directly stating that he had never received any money from the sale of any of the base lands, and the existence of the powers of attorney to convey the selected lands are necessarily by the wording of said letter denied.

> "This was all, or nearly all, located for parties who were desirous of securing title to unoccupied government lands of the United States, under the provisions of contracts or agreements which in terms provided that after the land selected in lieu of the lands surrendered had been located and said locations had been accepted by the Commissioner of the General Land Office, and proper evidence furnished thereof, that the parties in whose interests the locations were made, would, upon the delivery of a deed conveying the right of the owners, pay the amounts agreed upon.
>
> "Up to the present date there has not been a single location accepted by the Commissioner of the General Land Office. It is my intention just as soon as these acceptances can be had to ask for a confirmation of the sales by the court so that settlements can be made to both the owners and the parties in whose interests the locations were made" (Transcript 476-477),

and yet in the face of this statement made by Benson, we find from the pleadings of the appellants and from the records of the case that all the land involved in this case had been selected by the appellant Cobban under the purported powers of attorney and that he had fully paid Benson for

all of said land at the rate of more than $4.00 and more per acre. This statement made by Benson is such a fraudulent statement and is primary evidence of the fraudulent intent and purpose of Benson.

And in view of all the circumstances and conditions as shown by the record and by the finding of the court, it can not be held that any of the statements made by the appellee in her bill of complaint were made recklessly. The rash and wholly unauthorized methods pursued by the appellants in accepting a title under the conditions as shown by the record would certainly justify the appellee in making all the charges which she made against the appellants or either of them.

Appellants are very prone to insist throughout their brief that they paid for this land to the agent of the appellee. This statement is not only not warranted by any evidence appearing in the record but is wholly nullified by the direct finding of the court to the effect that the appellant Benson was never under any circumstance or condition the agent of the appellee.

COMPLAINANT'S BILL IS NOT WHOLLY FOUNDED ON FRAUD AND CONSPIRACY BUT BY THE ALLEGATIONS OF SAID BILL IT APPEARS THAT FRAUD AND CONSPIRACY ARE MERE INCIDENTS TO THE ALLEGATIONS OF THE FACTS IN SAID CAUSE.

Appellees claim under these powers, and the bill *alleges* the false and fictitious *character of the same;*

lack of assent; lack of execution, consideration or *delivery.*

Appellants contend that the theory in this case was changed by the court in the consideration of the case and that the appellants had no opportunity whatever to meet the charges under the new theory. The record does not bear out this contention of the appellants. An examination of the bill discloses that the appellee was charging the invalidity of the powers of attorney upon which appellants' title must rest, as the very ground work and substance of her bill, alleging the alteration specifically and the fraudulent and forged certificates, the unauthorized delivery and the procuring without her knowledge or consent, and that the subsequent deeds executed by Cobban under the said alleged powers of attorney were null and void and did not suffice to divest appellee of any title to said lands or vest the same in the appellants or either of them.

The pleadings of the appellants in this case are predicated upon the same theory; they set forth the facts and circumstances relating to their acquisition of their pretended rights in the premises, which constitutes too the allegations of appellee's bill and bears out and confirms her charges and statements.

The argument before the trial court was all predicated upon such theory and the court found in conformity with the theory advanced, upon the

trial and at the argument, by the appellee and upon the very issues joined in and made, upon the record and evidence, by the appellants, and it is the appellants now who seek to change the theory of the case and to predicate their defense upon a new and entirely different theory, and to cloud the issues.

In 16th Cyc. at page 483, the rule is laid down:

> "The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief. Every fact essential to entitle plaintiff to the relief which he seeks must be averred in his bill, and relief cannot be granted for matters not alleged, even though they may be apparent from other parts of the pleadings and proofs. But in the application of this rule an exact and absolute correspondence between bill and proofs is not required; if the facts found as the basis of the decree are substantially the same as those alleged in the bill, it is not a ground of error in the decree that they vary in some unimportant particulars."

We are unable to see upon what theory appellants contend that the relief granted by the court was not within the scope of the allegations of the bill and the proofs offered in support thereof. In this case, there is no question raised as to the jurisdiction of the court over the subject matter of the action. It is shown by the pleadings and by the proofs and admitted by the appellants that the amount in controversy is sufficient to vest the

court of jurisdiction and that there is the diversity of citizenship required to vest jurisdiction of the court. Hence we believe the true rule is to be as follows:

> "That the court will only grant such relief as the plaintiff is entitled to, upon the case made by the bill, is most strictly enforced in those cases where the plaintiff relies upon fraud. Accordingly, where the plaintiff has rested his case in the bill upon imputations of direct personal representations and fraud, he cannot be permitted to support it upon any other ground; but if other matters be alleged in the bill, which will give the court jurisdiction as to the foundation of a decree, the proper course is to dismiss only so much of the bill as relates to the case of fraud, and to give so much relief as under the circumstances the plaintiff may be entitled to. If the plaintiff has rested the case for relief solely on the ground of fraud, he cannot, if he fails in establishing fraud, pick out, from the allegations in his pleadings, facts which might, if not put forward as proof of fraud, have warranted the plaintiff in asking, and the court in granting relief."
>
> Daniels Ch. Pr. 6th Amer. Ed. I, *382.

The case of Williams v. The United States, 138 U. S. 514, 524; 34 Law Ed. 1026, was a case involving the title to public lands alleged to have been improperly certified to the State of Nevada. And Justice Brewer, delivering the opinion for the court, says:

> "The second contention is that the court erred in finding that there was fraud or wrong by which the title was taken away from the

> general government. The allegations of the bill are of fraud and wrong but they also show inadvertence and mistake in the certification of the State and it cannot be doubted that inadvertence and mistake are equally, with fraud and wrong, grounds for judicial interference to divert a title acquired thereby. This is equally true in transactions between individuals and those between the government and its patentee. If through inadvertence and mistake, a wrong description is placed in a deed by an individual and property not intended to be conveyed, is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So, if any other inadvertence and mistake vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings as to the transfer of title are fully disclosed in the bill. They point to fraud and wrong and equally to inadvertence and mistake and if the latter be shown, the bill is sustainable, although the former charge against the defendant may not have been fully established."

Certainly, the facts in this case are fully alleged and made to appear within the bill and are fraud squarely within the rule laid down in the above cited case. The rule contended for by appellants as to the sufficiency of the bill of complaint to warrant the court in granting the relief awarded by the decree, is based solely upon cases where the defendants are misled and surprised by reason of the manner in which the bill is framed, but this cannot be true in the case at bar because all

the facts upon which the court bases the decree are fully alleged in the bill and appellants have met such allegations and put the matter in issue by the manner in which their answers are drawn, and even counsel for appellants have failed to point out any matter in which they have been taken by surprise in this case excepting upon the mere question of the proposition of possession in plaintiff being necessary in order to maintain a bill to cancel a cloud on title or prove the lands are vacant and unoccupied.

This rule is not universally correct and yet it is shown by the bill itself (Transcript, p. 3), that the complainant alleged that she was not in possession of the lands in controversy and alleged that on the contrary said lands are vacant, unoccupied, wild and uncultivated timber lands and not in the possession of any person. The appellant, Payette Lumber & Manufacturing Co., a corporation, admitted that the lands involved are wild and uncultivated timber lands by the terms of their answer (Transcript, p. 42), and the same is true of the answer of the appellants Cobban and Weirick (Transcript, pp. 67 and 68); by the testimony of E. M. Hoover, general manager of the appellant, Payette Lumber & Manufacturing Company, it is shown that the lands are in a wild and natural state and uncultivated lands (Transcript, p. 282), but under the rule and authorities applicable to cases such as those at bar, possession is not necessary.

Pomeroy's Equity-Jurisprudence, Vol. 6, Section 731, lays down the following rule:

> "Possession of Plaintiff. 'As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose and careless statements of judges, and an overlooking of the principles of equity in regard to the exercise of its jurisdiction. When the estate or interest to be protected is equitable, the jurisdiction should be exercised whether the plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment, under ordinary circumstances. But where he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity. Where, on the other hand, a party out of possession, has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned. While it cannot be said that the cases are uniform on the above propositions, still it is believed that the rule stated, and the above explanations are founded on principle and are sufficient to reconcile a vast majority of the conflicting, or apparently conflicting, judicial opinions and dicta on this question. In some of the cases the rule is so broadly stated as to require a plaintiff, seeking to have a cloud removed, under all circumstances to be in possession; while, on the other hand, it is as generally stated that possession is never essential. Both

of these extreme views are open to criticism, and the cases should always be considered with reference to the facts actually before the court.' Where, however, neither party is in possession or where the lands are wild and unoccupied, it has been generally admitted that the remedy at law is inadequate and that equity has jurisdiction to remove or prevent a cloud."

In the case of Sayers v. Burkhardt, 29 C. C. A. 137, the court says:

"The first question presented by the assignment of errors is as to the jurisdiction of the court. Appellants insist that the court below, as a court of equity, had no jurisdiction of this case, for the reason that it was not alleged in the bill that the complainants were in possession of the land referred to therein at the time of the institution of this suit, the appellants claiming that such allegation was necessary, as the object of the suit was to remove clouds from the title to said land, caused by the existence of the proceedings and deeds mentioned. In the first place, this is a misconception of the scope of complainant's bill, for its evident purpose was not only to remove said clouds from their title, but also to set aside as fraudulent certain proceedings had in the circuit court of McDowell County, W. Va., to declare the deeds made in pursuance thereof null and void, and to decree that complainants' lands should be held by them free from the lien of certain taxes and of the claim of forfeiture set up in said proceedings. It is alleged in the bill that George J. Burkhardt died seised and possessed of the land proceeded against, and that the complainants are his legal heirs. In suits of this character, such allegations are sufficient to give a court of equity jurisdiction, for under such circumstances, where fraud is

charged, or the cloud is caused by a tax deed, the remedy at law is not plain, adequate and complete. This ground of equity jurisdiction and this rule of procedure is now so well established that it will not be questioned by this court, particularly concerning suits having reference to deeds made under the provisions of the West Virginia statutes referring to forfeited and delinquent lands in that State.

"Gage vs. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406;

"Coal Co. vs. Doran, 142 U. S. 417, 449; 12 Sup. Ct. 239;

"Rich vs. Braxton, 158 U. S. 375, 406; 15 Sup. Ct. 1006;

"Harding vs. Guice, 42 U. S. App. 411; 25 C. C. A. 352, and 80 Fed. 162;

"Christian vs. Vance, 41 W. Va. 754; 24 S. E. 596."

Counsel for appellants cite in support of their position, that possession in the plaintiff or proof that the lands are vacant and unoccupied, are necessary, the following cases:

Whitehead v. Shattuck, 138 U. S. 146; 34 Law Ed. 873;

Lawson v. U. S. Mining Co., 207 U. S. 1; 52 Law Ed. 65;

Whitehouse v. Jones (W. Va.), 12 L. R. A. (N. S.) 76 note;

Stockton v. O. S. L. R. Co., 170 Fed. 626.

These cases are all cases predicated upon statutes of different States in which it is provided that a suit in equity against defendant in possession of

real estate to quiet title and recover possession, or to remove a cloud, can not be maintained because the remedy by ejectment was plain and adequate. This rule of the common law and of equity has been set aside and changed by express statute of the State of Idaho. Section 4538 of the revised codes of Idaho in force since long prior to 1887, provides as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

In construing this statute, the Supreme Court of Idaho has held in the case of Coleman v. Jaggers, 12 Ida. 125, 85 Pac. 894, as follows:

> "Anyone claiming some right or interest in land may maintain a suit to quiet his title under this section, although he has neither the possession or the legal title to said land. Thus, the holder of the equitable title may maintain a suit against the holder of the legal title."

The above section of the Idaho statutes is identical with Section 738 of the Code of Civil Procedure of California, 1872, and practically identical with the same section of Deering's Code and Kerr's Code, and from an early day in California, the court has held in conformity with the decision of the above case cited from the Supreme Court of Idaho.

In the case of People ex rel. Love v. Center, 66 Calif. 551-6; 5 Pac. Rep. 263; 6 Pac. Rep. 481, the

Supreme Court of California has held under this section:

> "One having legal title is not required to bring his action at law and then after recovery of possession, to file bill to quiet his title or possession against equitable claims asserted by defendant in ejectment, and to have such claims decreed to be invalid, but may secure both ends in one proceeding."

In the case of Darragh v. Wetter Manufacturing Co., 23 C. C. A. 609, and after an exhaustive consideration of the exact question involved in this case, viz., whether an enlargement of equitable rights by the statutes of the State may be administered by the Federal court as well as by the courts of the State, it is stated, citing from page 607:

> "Upon a careful review of all these authorities and especially in view of the decisions in the last two cases to which we have adverted (Gormley vs. Clark, 134 U. S. 338, 10 Sup. Ct. 554; Cowley vs. R. R. Co., 159 U. S. 569, 582, 16 Sup. Ct. 127), it may, we think with safety, be said that the following rule relative to the jurisdiction and powers of the Federal courts to enforce rights created and to administer remedies provided by State statutes for enforcement and administration in the courts of the state has been firmly established in the jurisprudence of the United States. Rights created or provided by the statutes of the States to be pursued in the State courts may be enforced and administered in the Federal courts, either at law, in equity or in admiralty, as the nature of the rights may require. Ex parte McNeil, 13 Wall. 236; Cummins vs.

> Bank, 101 U. S. 153, 157; Trust Co. vs. Krumseig (May term 1896), 23 C. C. A. 1; 77 Fed. 32. An enlargement of equitable rights by the statutes of the States may be administered by the national courts as well as by the courts of the State. Case of Broderick's will, 21 Wall. 503, 520; Clark vs. Smith, 13 Pet. 195, 202; Holland vs. Challen, 101 U. S. 15, 25; 3 Sup. Ct. 495; Frost vs. Spitley, 121 U. S. 552, 557; 7 Sup. Ct. 1129; Reynolds vs. Bank, 112 U. S. 405; 5 Sup. Ct. 213; Chapman vs. Brewer, 114 U. S. 158, 170, 171; 5 Sup. Ct. 799; Gormley vs. Clark, 134 U. S. 338, 348, 349; 10 Sup. Ct. 554; Bardon vs. Improvement Co., 157 U. S. 327, 330; 15 Sup. Ct. 650; Cowley vs. R. R. Co., 159 U. S. 569, 583; 16 Sup. Ct. 127. 'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality.' Ex parte McNeil, 13 Wall. 236; Davis vs. Grayes, 16 Wall. 203, 221; Cowley vs. R. R. Co., 159 U. S. 569, 583; 16 Sup. Ct. 127."

In the case of Devine v. Los Angeles, 202 U. S. 312, 50 Law Ed. p. 146, Chief Justice Fuller, delivering the opinion for the court, says, in construing Section 738 of the California Code of Civil Procedure:

> "This statute enlarged the ancient jurisdiction of the courts of equity in respect to suits to quiet title but the equitable rights themselves remaining the enlargements thereof may be administered by the circuit courts of the United States as well as by the courts of the State."

Citing with approval, Broderick's Will, 21 Wall. 503; 22 Law Ed. 599; Holland v. Challen, 110 U.

S. 15; 28 Law Ed. 52; Gormley v. Clark, 134 U. S. 348; 33 Law Ed. 913.

In the case of Moore v. Steinbach, 127 U. S. 70-84, 32 Law Ed. 51 and 56, Justice Field, speaking for the court, holds as follows:

> "As to the want of any allegation in the complaint of possession by the plaintiffs or any evidence of that fact in the proof, it is sufficient to say that by Section 738 of the Code of Civil Procedure of California, a plaintiff, though asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate or interest in the premises. People vs. Center, 66 Cal. 551. A statute of Nebraska, authorizing a similar suit by plaintiff out of possession was before this court for consideration in Holland vs. Challen, 110 U. S. 15 (28 Law Ed. 52), and the jurisdiction of a court of equity to grant the relief prayed in said case was sustained. See also Reynolds vs. Crawfordsville First National Bank, 112 U. S. 405, 411 (28 Law Ed. 733, 736; Chapman vs. Brewer, 114 U. S. 158, 170, 171 (29 Law Ed. 83, 87, 88); U. S. vs. Wilson, 118 U. S. 86, 89 (30 Law Ed. 110, 112); Frost vs. Spitley, 121 U. S. 552, 557 (30 Law Ed. 1010, 1012)."

The position of appellants as to surprise and such matters is wholly untenable, for the following reasons: that the allegations of the complaint are that the lands are wild and uncultivated lands; that appellants have admitted such fact and that the testimony so shows; that the statutes of the State of Idaho having extended the equitable powers of the court so as to eliminate the necessity of

possession, the courts of the United States will enforce such remedies in such State, as provided by statute and construed by the highest court of the State. Also that the legal title, as shown by the records, vesting in the appellant, Payette Lumber & Manufacturing Co., the interest of the appellee in said land was such an equitable interest that she had no plain, speedy and adequate remedy at law except by the cancellation of the instruments under which the appellants claim title.

APPELLANT COBBAN HAD NO AUTHORITY, EXPRESS OR IMPLIED, TO INSERT HIS OWN NAME IN BLANK POWERS OF ATTORNEY, OR TO CONVEY TO WEIRICK AS ATTORNEY-IN-FACT OF THE APPELLEE.

The appellants in their brief insist that the appellant, Cobban, had implied authority to fill in the blanks in the powers of attorney, predicating their contention upon a supposed agency of Benson for the appellee, but the record is wholly silent as to any agency of Benson for the appellee and appellants have wholly failed to point to any place in the record where any testimony was offered, tending to establish such agency, either directly or indirectly. The only person who was connected with the transaction as agent, either expressly or impliedly, for the appellee was Campbell and Benson was the purchaser or party dealing with the appellee through such agent.

The court says:

"If it be conceded that such authority need not be in writing, and that it need not even be expressly conferred, it still remains true that in some manner it must emanate from the grantor. It is not pretended that in the present case the plaintiff, in writing or otherwise, expressly authorized Cobban to act as her agent in this respect, and authority, if any there was, arose by implication alone. But from what fact or facts can the inference of such authority be legitimately drawn? Where a grantor receives the purchase price agreed upon and delivers a deed, otherwise complete, from these facts alone it may, not improperly, be inferred that he intended to authorize the purchaser to insert the name of the grantee in the blank left for that purpose. Such would be a natural inference. But the plaintiff here did not deliver these papers, nor did she receive the stipulated purchase price. They came into Cobban's possession through the fraud of Benson, either actual or constructive, and without the knowledge or consent of the plaintiff, or of her agent, assuming that Campbell was her agent. She had never heard of Cobban, and, prior to the meeting at Campbell's office, Benson had been a total stranger to her. The payment to, and the receipt by, Benson of the purchase money paid by Cobban gives rise to no implication. It is not the payment of the purchase money by the purchaser, but the receipt by the grantor, that tends to disclose the grantor's intent. Benson had no authority to receive the purchase money for the plaintiff; he was not her agent, and probably never thought of the relation existing between himself and the plaintiff as that of agency.

"In his transactions with Cobban, he was the vendor, and in his relations with the plaintiff he was the vendee or purchaser. Certainly, it would be quite as reasonable to hold that he was the agent of Cobban to deliver the purchase money to the plaintiff as to hold that he was the agent of the plaintiff to receive it. My conclusion is that, when Cobban purchased these instruments, he took them at his peril. Upon their face, they appeared to be incomplete, and therefore inoperative, and to give them effect it was requisite that the name of a qualified person be inserted by some one authorized so to do. The authority was not conferred by the naked instruments themselves, and Cobban was bound to know that, unless it was evidenced by some writing or express declaration of the plaintiff, he must, if he would rely upon the power which the instruments purported to grant, establish facts from which it could legitimately be inferred. Such facts the record fails to disclose, and the instruments must therefore be held to be inoperative" (Transcript 510-511-512).

In the case of Tracey v. Withrow, 110 U. S. 119, 28 Law Ed. 90, the court says:

"The deed in blank passed no interest for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. It may be and probably is the law in Iowa, as it is in several States, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party by parol to fill up the blank."

Swartz v. Ballou, 47 Ia. 188;

Van Etta v. Evinson, 28 Wis. 33;

Field v. Stagg, 52 Mo. 534.

"As said by this court in Drury vs. Foster, 2 Wall. 33 (69 U. S. XVII, 781):

"'Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient.'

"But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it. The blank must be filled by the party authorized to fill it and this must be done before or at the time of the delivery of the deed to the grantee. Allen, to whom it was stated the deed was handed, with authority to fill the blank and then deliver the deed, gave it to his wife without filling the blank, and she died with the blank unfilled."

Counsel for appellants cited in support of their position 2nd Cyc. 160. A perusal of the citation will disclose that it refers only to negotiable instruments. At page 157, in 2nd Cyc., in discussing the alterations of deeds, it is said:

"If there has been a delivery, still the parties may consent to a change and redelivery, the new delivery constituting a re-execution, even without reacknowledgment, though it is also held that when the instrument is acknowledged before an officer appointed by law to take and certify the instrument, the parties have no right to make the most trifling change in it

without a redelivery and a reacknowledgment, the latter especially as against third persons."

"Where the instrument has been actually delivered, it is held on the one hand that a redelivery will be necessary and a mere parol authority at this stage to make an alteration in the absence of the obligor or grantor is not sufficient. On the other hand, actual redelivery is not necessary but the circumstances may be sufficient to import the legal equivalent of such delivery, as where the change is made in the presence of the parties, or where the grantor, himself, carries the instrument to the proper office to be recorded; subsequent assent or ratification may be sufficient and where the party who makes the change is the agent of the obligor, it is considered that parol authority is sufficient because the authority thus conferred is not to execute a deed but to make it certain by an alteration or addition."

The case of Michigan Insurance Bank v. Eldred, 9 Wall. (U. S. 54; 19 Law Ed. 763), is cited in support of this doctrine by appellants, but this case refers exclusively to negotiable instruments and of the completion thereof.

The evidence conclusively shows in this case that the appellee never intended to execute any powers of attorney to sell the selected lands, and the trial court finds with the appellee upon this point:

"There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney 'to convey' without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense,—whether the under-

standing was a transfer directly to Benson of the Monache lands or an exchange thereof with the government, and thereupon a transfer of the lieu lands to Benson or such person as Benson might designate,—according to all of the testimony, payment of the agreed price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title, from the plaintiff. Such is the testimony of the witnesses for the plaintiff, Campbell, in the most emphatic terms, so declares, and Benson, in effect, admits that such was the understanding. It is true, I think, that, when she signed the large number of documents sent to her from Campbell's office, the plaintiff acted without fully understanding their legal import, but even if it be held that, having voluntarily attached her signature, she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly nor impliedly did she authorize their delivery to Benson. Campbell testifies that it was not his understanding that such instruments were ever to be executed, and that personally he was wholly unaware of their existence until after this suit was commenced. He never saw them, and did not deliver them to Benson or authorize their delivery. Benson ventures no explanation and advances no theory in justification of their delivery to him. In some way, it does not appear just how, they all reached his office bearing false notarial certificates of acknowledgment, and came from either Campbell's office or directly from the hands of the notary public. The delivery was made either by the notary or a subordinate in Campbell's office, but whether such delivery was the result of fraudulent collusion or only innocent inadvertence, it was not in accordance with the original agreement, and had the au-

thorization or consent of neither Campbell nor the plaintiff."

"Where the execution of a deed is procured by deceit as when it is signed under the impression that it is a lease, it is a forgery and the question of good faith does not arise."

McGinn v. Tobey, 62 Mich. 252;

Camp v. Carpenter, 52 Mich. 375;

D'Wolf v. Hayden, 24 Ill. 525;

Griffiths v. Kellogg, 39 Wis. 293.

"Where a person never intended to sign a deed, and never knew that he had executed one, but in fact had signed without reading, under the apprehension that it was an entirely different instrument, the deed thus signed may be considered a forgery. Thus, where one who signed a deed believed it to be a duplicate of a lease of a part of the property described in the deed, which after a reading to and by him, he had signed, the lessee having placed two documents closely resembling each other upon the table to be signed, and there being a previous understanding that two copies of the lease should be signed, the court held the instrument to be a forgery and not the deed of the signer, and, also, that in a suit to set aside the deed, it being a forgery, the question of signing a supposed copy of the lease without reading it could not be considered. Where a title is founded upon a forged deed, it is not sufficient to examine the abstract simply, when the deed itself would have shown an alteration in its date, and when the grantor named in the forged deed was still in possession of the property."

Devlin on Deeds, Section 228;

McGinn v. Tobey, 62 Mich. 252 (4 Am. St. Rep. 848).

"A deed which has been surreptitiously and fraudulently obtained from the grantor without his knowledge or consent, does not, even as against a subsequent purchaser, without notice, transfer title."

Gould v. Wise, 97 Cal. 532;

Fitzgerald v. Goff, 99 Ind. 28;

Henry v. Carson, 96 Ind. 412.

"A deed purloined or stolen from the grantor, or the possession of which was fraudulently or wrongfully obtained from him without his knowledge, consent or acquiescence, is no more effectual to pass title to the supposed grantee, than if it were a total forgery, and an instrument of the latter kind had been spread upon the record. The only question which can ever arise to defeat the title of the supposed grantor in such cases, is whether he was guilty of negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it, and so be enabled to deceive and defraud innocent third persons.

"The obtaining possession of an instrument by fraud, larceny, or any other means short of the performance of the condition is against the assent of the grantor, and as the assent is essential to delivery, and a delivery is essential to the validity of the deed, it is difficult to perceive how A ever obtained any title what-

> ever to the premises, and, of course, equally difficult to perceive how he could convey any by any conveyance which he might execute to another. The recording of an escrow deed does not make it a deed. The legal title does not pass."
>
> Everts v. Agnes, 65 Am. Dec. 314.

Cases are frequent where the defense of bona fide purchaser is set up in these instances. But they all depend, nevertheless, upon the fact that the party voluntarily parted with the property and executed and delivered the evidence of its alienation. Not so, however, in the case of a forged or stolen deed. In the latter case, there is no assent of the alleged grantor. There is no delivery.

In the case of Arguello v. Bours et al., 67 Cal. 447 (8 Pac. 49), the Supreme Court of California says:

> "A deed in which the name of the grantee is left blank by the grantor at the time of its execution and afterwards inserted without his authority, does not convey the title, nor does it become sufficient for the purpose of passing the title from the fact that the grantee entered into possession and paid the purchase price."

The evidence conclusively shows and upon this there is no dispute that the appellee did not acknowledge before any notary public any of the powers of attorney to convey the selected lands. Under the statutes of Idaho, acknowledgment was necessary before a deed executed by the attorney in fact could be recorded.

Section 3154, Revised Codes of Idaho, being identical with Section 2995, Revised Statutes of 1887, provides as follows:

> "An instrument executed by an attorney in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office."

Section 2994, Revised Statutes of Idaho, 1887, provides as follows:

> "Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or proved, and the acknowledgment or proof certified in the manner prescribed by chapter III of this title."

These laws were in effect at the time of the recording said powers of attorney and at the time of the attempted deed under such powers. That the powers of attorney were blank at the time of their delivery as to the name of the grantee under the power is admitted by the defendants.

In the case of Drury v. Foster, 2 Wall. 24 (17 Law Ed. 780), involving the validity of a mortgage signed and acknowledged by the wife, but blank as to the mortgagee and the amount of the mortgage, and delivered to the husband who afterwards filled in the name of the mortgagee and the amount of the mortgage, the Supreme Court of the United States says:

> "Now, it is conceded, in this case, that the instrument of Mrs. Foster, signed and acknowl-

edged, was not a deed or mortgage; that, on the contrary, it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. If she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted. Although it was at one time doubted whether a parol was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient. But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and, second, *there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged.* The act of the feme covert and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing."

In this case, the court will notice that the evidence shows that all of the acknowledgments of the alleged powers of attorney were dated prior to their delivery to the defendant, Cobban, and we contend that, not being complete at the time of delivery, that the powers of attorney were, as well said by the United States Court in the case just cited, mere waste paper.

The position of the appellant, Cobban, is solely based upon an implied authority to fill in his own name in the powers of attorney, to be implied from the mere fact of their delivery to him. These powers all relate to the conveyance of real property and the same rule would be applicable to such instruments as would apply to a deed executed under like circumstances and conditions. The power of attorney to convey real property must be complete at the time of its delivery or there must be in contemplation of the party at the time of the execution thereof some person to whom the power shall be granted. Cobban was not known to the appellee at the time of the signing of the powers of attorney and his name was not mentioned to her as a possible or probable grantee of the power, so she could not have contemplated that his name would be filled in as grantee.

> "Where a person signs a deed and acknowledges the same, leaving the grantee's name blank and afterward it is filled in with a name which the grantee did not authorize, the deed is void."
>
> Burke v. Bours et al., 92 Calif. 112 (28 Pac. 57);
>
> Arguello v. Bours, 67 Calif. 450.

Again, in the case of Vaca Valley R. Co. v. Mansfield, 84 Cal. 561; 24 Pac. 145, the Supreme Court of the State of California says:

> "A deed signed in blank and afterwards filled in without authority and certified is forgery, absolutely void and ineffectual to convey any title as if it were an entire forgery."

It is apparent from the record that all of the dealings of the appellant, Cobban, with Benson, were made pursuant to and carrying out a previous agreement between himself and the appellant, Weirick, and others, representing the syndicate, whereby Cobban became the agent for the syndicate under an express agreement; that all lands purchased by him should be conveyed to the appellant, Weirick, as trustee for the syndicate. The appellants concede that Cobban acted entirely within the scope of his authority as such agent and the agency is expressly alleged and admitted in the joint answer of appellants Cobban and Weirick, and under the well established law of agency, the act of Cobban became the act of Weirick and their associates and they became bound by his acts and are chargeable directly with notice of any act of his in connection with the insertion of names in the blank powers and the conveyance to Weirick, as trustee, being in pursuance of a prior agreement would charge Weirick and his associates with notice of all defects. Appellants by their brief contend for some doctrine, seeking to avoid the acts of Cobban in inserting the name in the blank powers whereby they would invest the rights of the appellee in the base lands and the power to convey the selected lands upon a par with personal property.

In the case of Puget Mill Co. v. Brown et al., 54 Fed. 987, a case involving the purchase and sale of so called "scrip", at page 993 the court says:

"Now, by the agreed statement of facts before me it appears that the complainant did not deal directly with Susan King; and, giving to its officers and agents credit for the sagacity and prudence of business men of ordinary intelligence, there appears to be no theory consistent with the facts which can lead to a conclusion that there was any bona fide attempt to transfer any right to the land which the parties could reasonably have supposed to have been acquired by the additional homestead entry. An attempt to convey a title cannot be bona fide on the part of the vendee unless in making the purchase he acts with reasonable prudence, and under an honest belief that the vendor has the right to convey the title to him. Now, I find annexed to the statement of facts the original instrument, purporting to be a power of attorney from Susan King to W. D. Scott, under which the deed to plaintiff was executed by Scott. By the date of its execution and acknowledgment, in connection with the admitted fact that the complainant's bargain was for 'Scrip' (so called)) and that it paid the purchase money to a stranger, and the further fact that upon the present trial the complainant has not offered to prove that the so called 'scrip' which it bargained for was different in character from the sets of blanks which were commonly sold and traded in by dealers, and by them called 'Soldier's Additional Homestead Scrip,' the inference is justified that the complainant, at the time of its purchase, either knew, or ought to have known, that said power of attorney either divested the maker of it of all her beneficial interest in the land some four months prior to the additional entry in the land office at Olympia, and therefore falsified the statements of the application and affidavits whereby the entry was made, or that, at the

> time when it left the possession and control of its maker, said power of attorney was a mere blank, utterly void, and that by subsequently filling the blanks, so as to make it appear to be complete and valid, a forgery was committed."

The doctrine contended for by counsel for appellants is based solely upon two erroneous propositions: First, The same rules are applied to alteration of an instrument affecting title to real estate as are applied to negotiable instruments and stock of corporations. To which there can be no parallel either in law or fact, when considering the alteration of an instrument relating to the sale and transfer of real property. Second, for an incompleted deed or instrument delivered to an agent or other person with express power to complete the instrument. In this case, four elements found in all cases are lacking. First, Benson was not and did not claim to be the agent for the appellee. Second, the appellee did not knowingly or intentionally execute or sign the powers of attorney, and third, the powers of attorney, as found by the trial court, were never delivered to Benson, and fourth, there is no evidence or circumstances surrounding the execution of the powers of attorney from which the authority to fill blanks could be implied. Neither is there any such authority implied from the delivery, for the court finds that there was no delivery. It is conceded that the statutes authorizing the surrender of the base land and the selection of the lieu lands were such that the lieu lands must be selected in the

name of the person who surrendered the base lands. Hence, there is no law, authorizing the assignment of this right.

Another element which is essential in any case where possession of a deed or instrument executed in blank is to be construed as giving implied authority to complete the same, is that it must have been entrusted by the owner to the possession of the person from whom it was obtained.

In this case, the evidence shows and the court has found that the powers were never delivered by either the appellee or Campbell to Benson. And all the elements necessary from which to imply authority to fill in the powers are wholly lacking.

APPELLANT, THE PAYETTE LUMBER AND MANUFACTURING COMPANY, DID NOT TAKE THE LEGAL TITLE AS A BONA FIDE PURCHASER WITHOUT NOTICE.

The record shows that the appellant, Payette Lumber and Manufacturing Company, received a deed for the property involved in this action by deed, Defendant's Exhibit "A", dated May 19, 1903.

The record shows that the appellant, Payette Lumber and Manufacturing Company, receiving a deed from a grantor designated as trustee, made no inquiry as to the name or interests or the persons for whom Weirick was acting as trustee or the nature of the trust under which he held title. At the time of the execution and delivery of said deed,

the revocation of the power of attorney executed by the appellee on January 3, 1903, and recorded January 16, 1903, in Boise County, Idaho (Complainant's Exhibit "T", Transcript 503) was a part of the records of the county in which said property was situated and certainly the duty was incumbent upon the purchaser to make an examination of the records and of all instruments affecting the title up to the date of the purchase. The addition of the word "Trustee" to the name of Weirick in the deed executed by Cobban as purported attorney in fact for Mollie Conklin and the Reddy Estate imposed upon the Payette Lumber and Manufacturing Company the duty of making some inquiry and investigation as to the nature and character of the trust. This is especially true, in view of the fact that the deed tendered by Weirick as grantor and conveying the property also designated Weirick as trustee.

The appellants, Cobban and Weirick, admit that the powers of attorney came into their hands incomplete, and a paper not showing any vested right. Such being the case, it appears to us that the filling in of the name of R. M. Cobban was a plain act of forgery.

Appellants having admitted the terms and conditions of a previous agreement under and by the terms of which the pretended powers of attorney were secured and the conveyance made, and that such conveyance was made in pursuance of said agreement and in consideration of money paid on

the order of Cobban from time to time, the conveyance by Cobban would pass the title to E. B. Weirick, as trustee, subject to all equities and claims of the complainant, Mollie Conklin, and the appellant, E. B. Weirick, trustee, could not and does not attempt in this case to plead that he was a bona fide purchaser of the land under the deed from Mollie Conklin and others, by the hands of R. M. Cobban, their attorney in fact, and the mere knowledge that R. M. Cobban, acting as the agent of Mollie Conklin, deeded to a trustee, creating a trust in favor of himself, would certainly bring home to the grantee of such deed full notice of all claims of the complainant and the law will not permit an agent to deal with the property of his principal and create an estate therein in favor of himself without showing that his actions were in the whole fair and free from any taint or suspicion of fraud, and certainly the parties associated with him in this fraud can not clothe themselves with the equitable protection of a bona fide purchaser.

> "The addition of the word 'trustee' to the name of a person is notice of a trust and calls for inquiry and examination."
>
> Mayberry v. Ehlen, 20 Am. St. Rep. 467;
>
> Mer. Nat. Bank v. Parsons, 40 Am. St. Rep. 299.

Where the word "trustee" is inserted in a deed to land after the name of the grantee, and in a subsequent contract relating to the sale of the land, he

affixed the word "trustee", such word is not merely descripto persona, but it indicates that the grantee takes the title, not in his individual capacity, but in trust for another not disclosed, and parol testimony is admissible to show for whom and for what purpose he was constituted trustee.

Johnson v. Calman, 41 Am. St. Rep. 284.

In the deed under which the defendant, Payette Lumber & Manufacturing Company, holds, the grantor is designated as "E. B. Weirick, trustee."

In the case of Mercantile National Bank v. Parsons, 40 Am. St. Rep. 299; also cited at page 202, the Supreme Court of Minnesota says:

> "It is a settled doctrine that a purchaser is chargeable with notice of facts recited in deeds under or through which he takes title and while the word 'trustee' in a deed gives no notice of the name of the beneficiary or of the character of the trust, yet it does give notice of a trust of some description which imposes the duty of inquiry as to its character and limitations, and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led."

Again, in the same case, the court says:

> "As the deed gave no indication as to who the possible beneficiary was, the only person to whom inquiry could or would naturally be made were the grantor and the grantee. If Fletcher, the grantor, had been inquired of, presumably the market company would have been informed, as the facts were, that the consideration was paid by the farming company, and at its di-

> rection the deed made to Crowell. There is nothing, however, to suggest that Fletcher knew of the subsequent declaration of trust by Crowell in favor of Parsons and Handy. The other person of whom inquiry could be made was Crowell, who made a statement of the situation, which, especially, in view of the fact that the farming company had paid the consideration for the property, was reasonable and natural, and one upon which a prudent man would have been justified in acting without inquiry whether possibly some one other than the farming company might not be the beneficiary."

Had the defendant Payette Lumber and Manufacturing Company made inquiry of Weirick, he would have informed it that Cobban was a beneficiary, and they would have discovered that Cobban acting in a fiduciary capacity had created a trust in himself in his principal's property, then it would have been its duty to enquire of Mollie Conklin and it would have discovered all.

Having failed to make any inquiry, it is presumed under the law that everything which an inquiry would have brought to the knowledge of the purchaser is chargeable to him. The record title to the property in question, as presented to the Payette Lumber & Manufacturing Company, discloses the following facts:

That a conveyance from Mollie Conklin and the Reddys, executed by R. M. Cobban as attorney in fact, had been made to E. B. Weirick, trustee, and that E. B. Weirick, trustee, was conveying the prop-

erty to the Payette Lumber & Manufacturing Company. A reasonably prudent man, and the law presumes that the Payette Lumber & Manufacturing Company is such, would have made a reasonable inquiry, as suggested in the foregoing case and such inquiry would naturally have been made of the grantors, Mollie Conklin and the Reddy Estate and of E. B. Weirick, trustee. This inquiry was not made (Transcript 250). Also there was before the Payette Lumber & Manufacturing Company at the time of accepting said deed, the revocation of the powers of attorney filed by the appellee in the recorder's office of Boise County.

Under the facts in this case, the Payette Lumber & Manufacturing Company cannot acquire any better title than that held by their grantor, E. B. Weirick, trustee.

> "Not only will an alteration vitiate the instrument as between the immediate parties, but also as against a bona fide holder or endorser without notice, as the latter can acquire no right or title other than that of the person under whom he claims."
>
> Pelton v. San Jacinto L. Co., 113 Cal. 21 (45 Pac. 12).

> "The general doctrine, indeed, is that notice is not binding, unless it proceed from a person interested in the property, and in the course of a treaty for its purchase. But this rule applies to notice only in its limited sense, as distinguished from knowledge or such information as is substantially equivalent to knowledge. If it be shown that a purchaser knew, or was in-

formed of the existence of a fact tending to impeach or cut down the title of his vendor, it is immaterial whether his knowledge was obtained from parties in interest, or third persons. From whatever quarter it may proceed, it will be sufficient, if it be so definite as to enable the purchaser to ascertain whether it is authentic or not, and sufficiently clear and definite to put him on inquiry, and to conduct that inquiry to an ascertainment of the fact."

Bigelow on Equity, Chap. XI, page 182, Sec. 1.

"Another ground for relief in equity (and the relief is applied almost as frequently in courts of law) is found in the doctrine of notice. A purchaser of property, with notice that the title of the vendor is liable to be disputed for fraud, or other infirmity, is entitled to no consideration at law or in equity, if the fraud or other infirmity be established. He stands in ordinary cases, in the precise position of the vendor himself."

Bigelow on Equity, Chap. II, Sec. 1.

Defendants admit that not a single one of them made any inquiry regarding these instruments, of any person whomsoever,—they have pleaded, and at all times allege and contend that they were purchasing *the right to select*. A right to select is an equity, therefore they stand in no position to plead that they were bona fide purchasers.

The documents which they received demonstrated that the parties therein designated as grantors had no right to convey, because: In the Reddy interest the order of the probate court in California, upon

its face, showed that such order was not being complied with, admitting that it was valid, while, if they had investigated the abstract as to the Mollie Conklin interest, they would have ascertained that a portion of the base lands involving Mollie Conklin's interest had not been probated.

Cobban testified that he had no authority from Mollie Conklin to fill in blanks in the alleged powers of attorney. When asked if the complainant Mollie Conklin had authorized him to fill blanks, he replied, "Only in a general way as her agent", and, when told that he was being asked specifically, he stated: "Not from Mollie Conklin personally" (Transcript 270).

He *considered* he had authority.

He *assumed* from the fact that the papers were delivered to him for a consideration, that he had a right to make such insertions as he saw fit (Transcript 271).

We ask of counsel: "What is it that Mollie Conklin did to enable any wrong to be committed against these defendants?" "What act of negligence is she guilty of?"

Appellants allege but two answers: The signing. The delivery.

As to the signing (if it be Mollie Conklin's signature): It did not injure them, and did not deceive them, for they, without exception, admit they did

not know her signature, and did not rely upon it. Therefore they were not misled by it.

As to an alleged delivery: The testimony of their own witnesses is that no such instrument as a power of attorney to convey was agreed upon and no delivery was authorized. Mollie Conklin cannot be held because these alleged powers were procured without her knowledge or consent.

In this case, the defendant, Payette Lumber & Manufacturing Company claims that they purchased the property from Weirick and that Weirick's title came through the use of the powers of attorney from Benson. This could not constitute them a bona fide purchaser from Mollie Conklin.

In the case of Puget Mill Co. v. Brown, reported in the 7 C. C. A., page 643, the court holds that a purchaser from a person claiming to represent the person making the homestead entry is not a bona fide purchaser from the latter, and in this case the title coming through Benson, they can not claim to be a bona fide purchaser from Mollie Conklin.

> "The doctrine of bona fide purchaser without notice, does not apply when there is a total absence of title in the vendor. The good faith of a purchaser can not create a title where none exists."
>
> Dodge v. Briggs, 27 Fed. Rep. 160.

> "To the application of this doctrine of a bona fide purchaser there must be a genuine instrument, having a legal existence, as well as one appearing on its face to pass title. It can not

arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

Hyde v. Shinn, 199 U. S. 83.

"Where a party in his plea or answer desired to claim that he was a bona fide purchaser for a valuable consideration, he should state the deed of purchase, with the date, parties and contents briefly; that the vendor was seized in fee and in possession; the consideration with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed; and how the grantor acquired title. Notice should be denied previous to and down to the time of paying the money, and the delivery of the deed."

Boone v. Childs, 10 Peters 193.

"In a plea of purchase for a valuable consideration, without notice of the plaintiff's title, it is necessary to aver that the person who conveyed was seized, or pretended to be seized, at the time when he executed the purchase deeds."

Flagg v. Mann, 2 Summ. 486, 557.

"It must be by a regular conveyance; for a purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity."

Boone v. Childs, 10 Peters 211.

In an opinion by Chief Justice Marshall in the case of Hunt v. Rousmainer, 8 Wheat. page 174, citing from page 204, it is held:

"As this proposition is laid down too positively in the books to be controverted, it be-

comes necessary to inquire what is meant by the expression, 'a power coupled with an interest'. Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import the meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him."

Then to hold that in this case, the power of attorney made by its terms irrevocable, would vest title in the holder of the power, it would be to say

that the power of attorney was in effect a deed. It certainly is not in form a contract for real estate and does not, on its face, give to R. M. Cobban, or to the persons claiming under the power, an interest in the property itself.

As said by the Supreme Court of the State of California, in the case of Freeman v. Rahm, 58 Cal. 115:

> "The power of attorney did not purport to be, and was not a transfer of the title—(party paid for and took irrevocable power of attorney)—Any act that plaintiff might have performed under it would have been as attorney-in-fact of Campbell, not as grantee. There was no instrument in writing by which any sale, or contract of sale, or declaration of trust, was evidenced."

To so hold, would be to hold that the evidence of title to real estate could become in effect personal property and pass by mere delivery. This rule, so far as we can find, has never been applied to real property and as applied to mercantile paper in the case of Chauncey v. Arnold, 24 N. Y. 330, the court says:

> "A paper intended to operate as a mortgage cannot be delivered and put in circulation with blanks to be filled, limiting the doctrine permitting such practice to mercantile paper."

There is another reason which prevents appellant, Payette Lumber & Manufacturing Company, from claiming as a bona fide purchaser without notice in

this case, viz., the patents issued by the United States for the land involved in this case were all executed to the appellee, Mollie Conklin, and to Emily M. Reddy, executrix of the estate of Patrick Reddy, deceased and Edward A. Reddy, administrator of the estate of Patrick Reddy, deceased. It is shown by the record that there was no administration in the State of Idaho of the estate of Patrick Reddy, deceased, and yet the powers of attorney under which Cobban presumed to act were those executed by the administratrix and administrator of said estate.

The law is well settled and needs no citation of authority that an administrator or administratrix can only sell real estate in the manner provided by law and by order of a court of competent jurisdiction, and certainly, it can not be claimed that authority could be expressed or implied for such persons to execute a power of attorney. Upon the face of the record, as presented to the Payette Lumber & Manufacturing Company, their title was wholly wanting, as to an undivided one-half interest in this land.

Hence, by taking the title that apparently on its face was to be a fee simple title to the entire estate and the notice that the estate was liable to be cut down by failure of the title secured from the administrator and administratrix of the Reddy Estate, they could not be bona fide purchasers.

THE REVOCATION OF THE POWERS OF ATTORNEY.

By the provision of Section 3162 of the Idaho codes:

> "No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded."

In this case, the revocation of the powers of attorney was duly acknowledged and duly recorded and being of record at the time when the appellant, Payette Lumber & Manufacturing Company accepted their conveyance, taken in conection with the use of the word "trustee" in the deeds to and from Weirick, was amply sufficient to put the appellant, Payette Lumber & Manufacturing Company, upon notice.

Counsel for appellants contend in their brief that the representatives of the Reddy Estate received $10,400 from Benson after notice of the existence of these powers of attorney and notice of all the facts in connection with the exchange of land. This statement is not borne out by the record. Campbell, the attorney for the representatives of the Reddy Estate, testified that he never knew of the existence of such powers until the time of the taking of his deposition in this case, and further, that he was led to believe by Benson that the money

paid to the estate was *advanced* by Benson in advance of any sales and was not the proceeds of the sale of any property.

AN UNAUTHORIZED DELIVERY OF PAPERS BY A SPECIAL AGENT OR ESCROW DEPOSITARY DOES NOT BIND THE PRINCIPAL, EVEN IN FAVOR OF THE SUBSEQUENT PURCHASER WITHOUT NOTICE.

The court found that the papers to be executed by the appellee and the representatives of the Reddy Estate were not to pass out of the control of the appellee except upon payment of the purchase price in full, and the court further found that by the terms of the sale as agreed upon between the appellee and Benson, in the presence of Campbell, Benson was to draft the papers and after their execution, they were to be deposited by Campbell in escrow at the Anglo-Californian Bank, with instructions to deliver to Benson upon receipt of the stipulated price (Transcript 512-513), and that Campbell's connection with said transaction was in the nature of a special agency.

The character of Campbell's agency is clearly defined by the testimony in the record and is specifically found by the court and the appellants did not attempt to introduce any evidence to change or vary the terms of such agency.

In Schimmelpennich v. Bayard, 1st Peter 264, 7th Law Ed. 138, the court says:

> "It is believed to be a general rule that an agent with limited power can not bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal is bound to know the extent of his authority."

As applied to the conveyance of real property and papers in connection therewith, the rule is universally held that the unauthorized delivery of an escrow deed does not operate to effect a transfer of title.

In 16th Cyc. 581, the rule is laid down and the great weight of authority sustains the view

> "that an unauthorized delivery of the instrument conveys no title or gives no right, even in favor of an innocent subvendee without notice of the conditions or event stipulated in the escrow contract and the authorities are very strong where the escrow has been obtained or delivered through fraud. The principle upon which the doctrine rests is that an instrument delivered in violation of the terms by which it has been placed as an escrow is not in fact delivered and that its possession by the grantee is no more effective to convey title than would be the possession of a forged or stolen instrument. Some authorities proceed upon the theory that a depositary is a special agent of the depositor and, therefore, his powers being limited, to the conditions of the deposit, one who claims through him takes the risk of the agent exceeding his powers."

To the same effect and holding the same rule are Skinner v. Baker, 39 Ill. 496; Berry v. Anderson, 22 Md. 36; Harkreader v. Clayton, 56 Miss. 383; 31

Am. Reps. 369; Tyler v. Cate, 29 Ore. 515-525; 45 Pac. 800; Patrick v. McCormick, 10 Neb. 1; 4 N. W. 312; Black v. Shreve, 13 N. J. Eq. 455; Smith v. South Royalton Bank, 32 Fed. 341; 76 Am. Decs. 179; Chipman v. Tucker, 38 Wis. 43; 20 Am. Reps. 1; Balfour v. Hopkins, 93 Fed. 564; 35 C. C. A. 445.

In the case of Provident L. etc. Co. v. Mercer Co., 170 U. S. 593 and 604; 42 Law Ed. 1156, the court distinguishes between the case of a bona fide purchaser of negotiable paper which had been wrongfully delivered by a depositary and that of purchaser of real estate under like conditions and the court quotes with approval the following language used in Fearing v. Clark, 16 Gray (Mass.) 74; 77 Am. Decs. 394:

> "The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until after a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was entrusted, but the law aims to secure the free and unrestricted circulation of negotiable paper and to protect the rights of persons taking it bona fide without notice."

In Devlin on Deeds, 3rd Ed., Sec. 322, the rule is laid down as follows:

> "Until the condition has been performed and the deed delivered over, the title does not pass but remains in the grantor. If the condition is not performed, the grantee, we have seen, is

> not entitled to the deed. If the depositary delivers the deed without authority to do so from the grantor or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtained conveys no title, either to the grantee or purchasers under him."

In the case of Balfour v. Hopkins, 93 Fed. 564; 35 C. C. A. 445, in commenting upon this rule, the court says:

> "The authorities are not in entire harmony as to the effect of the delivery of a deed which has been left in escrow to be delivered to the grantee upon the performance of a condition and which has been wrongfully delivered before the condition was performed. The decided weight of authority seems to sustain the view that such a delivery is inoperative to convey title, even in favor of an innocent purchaser without notice, unless the grantor has by some act or conduct of his own estopped himself to deny the delivery."

In the consideration of Calhoun v. American Emigrant Co., 93 U. S. 124; 23 Law Ed. 826, it was said:

> "Beyond doubt, the deed of the lands was delivered to the clerk of the respondent as an escrow and subject to the conditions that it should not be delivered to the grantees until they gave a mortgage to secure the full performance of the agreement under which the deed was executed. But it is equally clear that the condition required to be fulfilled before the delivery could be made was never performed and the rule is established by repeated decisions

that where a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed."

The following cases also bear out the rule:

Knapp v. Nelson, 41 Colo. 447; 92 Pac. 912;
Tyler v. Cate, 29 Ore. 515; 45 Pac. 800;
Bradford v. Durham, 45 Ore. 1; 101 Pac. 897; 135 Am. St. Reps. 807;
Powers v. Rude, 14 Okla. 381; 79 Pac. 89;
Bowers v. Cottrell, 15 Ida. 221; 96 Pac. 936.

It is clear in this case that the powers of attorney to sell the lands involved were never delivered by either the appellee or by her agent, Campbell, to Benson and the court finds (Transcript 516):

"In the third place, whatever may have been Campbell's authority, he did not knowingly deliver the instruments. In some unexplained manner, they came into Benson's possession, without Campbell's knowledge or consent. Campbell's positive disclaimer of knowledge is corroborated by the facts and circumstances of the case. It is wholly improbable that experienced lawyer that he was, he would, knowingly, authorize or acquiesce in the course pursued in this case, and thus needlessly jeopardize the interests of his clients. Whether Benson procured the papers by deception or through the inadvertence of the clerks in Campbell's office, his acceptance and use of them constituted a fraud upon the plaintiff's rights. There was no legal delivery of the instruments, either by the plaintiff or by her agent."

The whole record discloses and the court has found that the appellee never knowingly executed

or parted with possession of the powers of attorney to sell the selected lands; that they were not involved in and were no part of the papers which it was understood should be executed in connection with the lands, so that the case at bar is not one where the appellee could be charged with knowingly and voluntarily parting with possession of the instruments or submitting them to the care of any person, and under the overwhelming weight of authority, a title acquired by the means which the appellants have alleged in this case and under the facts as found by the court,—no title could be acquired by such instruments.

Counsel for appellants insist that the appellee is not required under the decree to do equity before she could recover. The court has found that by paying the amount that the appellee should have received under her contract with Benson, with interest from the date of the filing of the revocation of the powers of attorney, to-wit, January 16, 1903, at seven per cent., that the appellants may secure title. The record is wholly silent as to any evidence showing that the appellants or either of them have at any time, or at all, paid any taxes levied against the lands, or been to any expense, which the appellee claims in this action. Neither is there any showing of any protection against fire or other depredation, or that the value of the lands has been enhanced. These matters were such that the appellants should have made the same an issue on the trial of the case, and not in a brief.

As to the contention that the appellants are innocent in fact and in law, the appellants proceed wholly upon the theory of an alleged secret limitation on Benson's agency which they contend was "wholly inconsistent with the apparent authority with which he was clothed". This position is wholly unwarranted by the evidence or by any facts in evidence. The only circumstances under which the appellants can justify this position is the mere delivery of the instruments to them by Benson. The evidence taken by the appellants, to-wit, the evidence of Campbell and Benson, shows that in the dealings with the appellee Benson was the purchaser, and there is no testimony, direct or indirect, to show that Benson or any other person ever was vested with any powers, duties or agencies on behalf of the appellee. Neither is it shown that Benson ever pretended to act as the agent, special or general, with any powers or authorities to bind the appellee. As to the appellants and each of them, the record affirmatively discloses that no inquiry was made to ascertain or determine from Benson or from any other person the extent of the authority claimed by Benson, nor to investigate or determine whether or not he was the agent of the appellee, but they have testified and the court has found that they recklessly accepted incomplete instruments, to-wit, powers of attorney to convey real property, incomplete in form and on their face apparently acknowledged before an officer qualified to take and certify acknowledgments to instruments affecting

real property and without inquiry or investigation, recklessly inserted, or caused to be inserted the name of R. M. Cobban in such instruments and placed the same of record in Boise County, Idaho, to become a part and parcel of the chain of title to the lands involved, and we insist that under all the facts and circumstances, the record discloses, that the appellants have proceeded recklessly and without due investigation to ascertain the true facts, circumstances and conditions surrounding their attempted purchase of these lands from the appellee.

As to the question of laches, the same is wholly without merit. The record fully discloses the efforts made by the appellee to ascertain and determine the conditions of this property after she became cognizant of the acts of Benson. Within a month after she ascertained that any powers of attorney were being used in Boise County, Idaho, she filed a revocation in general terms of all powers of attorney and caused the same to be recorded in said county. Her suit was commenced within the time provided by the statutes of the State of Idaho and as to the contention that most of the witnesses who were familiar with the facts were dead prior to the commencement of said action, the same is wholly unwarranted because of all the parties interested, the only other person shown to have been present at the time of the alleged deal was Emily M. Reddy and the record is silent as to the time of Emily M. Reddy's death.

As to the maxim, "He who trusts most, ought to suffer most", we earnestly insist that the maxim is purely applicable to the case of the appellants. Under the facts and circumstances as proved in evidence, and as expressly alleged by appellants, Cobban and Weirick, they accepted the papers in the condition in which they both allege and prove they did accept them. They certainly were imposing in Benson, a degree of trust wholly unwarranted by any facts or circumstances, and there is no evidence to show that the appellee placed any trust or confidence in him in any manner or at all, and the appellants should certainly be made to suffer if anyone must suffer rather than that the burden should be placed upon the appellee.

Respectfully submitted,

N. E. Conklin,
Berkeley, California.

Wm. B. Davidson,
Boise, Idaho.

Solicitors for Appellee.

United States Circuit Court of Appeals for the Ninth Circuit.

R. M. COBBAN, E. B. WEIRICK, Individually and also as Trustee, and THE PAYETTE LUMBER AND MANUFACTURING COMPANY, a Corporation,

Appellants,

vs.

MOLLIE CONKLIN,

Appellee.

REPLY BRIEF OF APPELLANTS.

STATEMENT.

Counsel for appellee have presented a lengthy statement of facts in their brief which requires certain corrections and modifications. It is asserted at page 3 that the Conklin Estate was in the course of probate at all times during the year 1900, and at page 6, that Mr. J. C. Campbell was appellee's attorney at this time.

We do not consider these facts very material to the issues in this case, but wish to point out that these assertions are flatly contradicted by the record. The final decree in the Conklin Estate was signed December 1st, 1899, and filed February 16, 1900 (Complainant's Ex. "A," not printed in the record). The amended decree (Complainant's Ex. "V," Trans. 464) was filed a year after the transactions involved in this case, and the trial court found that Campbell was not appellee's attorney in any sense (Trans. 493); but even if he was her attorney, this would merely charge appellee, who trusted him, with the consequences of his acts as against appellants, who did not even know of his existence.

At page 5, Mr. Campbell is said to have testified that "by the agreement, the titles to the *selected* lands were to be approved in the names of the appellee and the Reddy Estate, and when so approved, that Mr. Benson would have the right to purchase the same at $3.80 per acre." But the only title that was to be approved by the Government was the title of appellee and the Reddy Estate to the base or Monache lands (Trans. 323, 338), and this title would not and could not be passed upon until the lieu selections were made. Until the United States Government had approved the titles to the base lands and thus accepted the lieu selections, the grantors could not lose control over the base land, and as soon as these titles were approved, they were entitled to their money under the agreement. The delay in the approvals was certainly due to no fault of Mr. Benson, but was caused by the state of the Monache titles, the *lis pendens* in the Broder case, and by the machinations of appellee. Mr. Campbell did testify that Mr. Benson did not have the money to pay for all the Monache lands, and that it was understood that he should sell the right to select, or the selected lands (Trans. 351, 352).

Mr. Benson's testimony that the powers of attorney to convey were discussed and understood by the parties was strongly corroborated (see page 6 of appellants' brief). Appellee contends that the acknowledgments on these powers of attorney were false and fraudulent, and relies upon oral testimony given ten years after the date of the acknowledg-

ments to the effect that she resided in Bakersfield, California, from December, 1900, to some time in the summer of 1901, to impeach the notary's certificates. The trial court held the question of the truth or falsity of these certificates wholly immaterial (Trans. 498). But assuming the point to be material, the assertion is not warranted by the record. Three of these powers of attorney (Complainant's Ex. "D," "K" and "L") were executed before Holland Smith in September, 1900, before appellee left San Francisco, and the correctness of these certificates is strongly corroborated by the evidence (Trans. 339–341). Complainant's Exhibits "C" and "M" were acknowledged after appellee had returned to San Francisco, while the balance of the powers of attorney were acknowledged about the first of March, 1901, and appellee's evidence is consistent with a visit to San Francisco at about this time.

R. M. Cobban, personally, was not a member of the syndicate for which appellant Weirick acted as trustee, as stated on page 7 of appellee's brief, but the R. M. Cobban Realty Company, a corporation, was a member of the syndicate, and appellant Cobban was one of the stockholders in this corporation (Trans. 244, 251, 257, 271, 272). Mr. Cobban was only benefited by the deal because of his interest in this corporation.

At page 9 of appellee's brief, counsel refer to appellant Cobban's testimony as to his authority to fill blanks in the powers of attorney. Appellant Cobban testified squarely that he had no express authority, written or oral, from Mollie Conklin personally to

fill these blanks, but that he had bought and paid for the scrip, and that it would have been utterly worthless unless he had authority to insert his name as agent. And under the authorities cited in appellants' brief (pp. 49–68), he was clearly justified in assuming that he had an implied authority to insert his own name and address. This was the only addition to the powers of attorney that was made or that needed to be made, and counsel's construction of Mr. Cobban's evidence is clearly unjustified.

The evidence of N. E. Conklin shows clearly that he had actual knowledge, as attorney and agent of appellee, as early as July, 1902, that powers of attorney to convey lands selected in lieu of the Monache lands were in existence, that such lieu lands had been selected in Boise County, Idaho, and that R. M. Cobban held powers of attorney of some sort (Trans. 214, 215, 224–226, 238). Furthermore, all the Cobban powers of attorney had been recorded in Boise County in 1901 and appellee was certainly charged with notice that such powers were on record, at least from and after July, 1902, when she learned of the selections in that county (see pp. 10, 11 of appellants' brief).

Appellee claims Mr. Benson perpetrated an actual fraud upon her, and cites the letter of December 11, 1901 (Trans., pp. 476–478). This letter is discussed at pages 26 to 29 of appellants' brief. In addition to the facts there stated it should be noted that under the agreement the money was not to be paid over until the titles to the Monache lands were approved by the Government (Trans. 323, 337–338, 351, 357,

386). But Benson advanced $2,750 to appellee and over $13,000 to the Reddy Estate before a single title was approved, and the reason no more money was advanced to appellee was because she had notified Campbell or Benson, or both of them, that she would not accept it (Trans., pp. 348, 349, 447, 448). And this was long before the letter, known as Complainant's Ex. "U–1," referred to in appellee's brief at page 12. It is also shown that at some time, the date of which is not fixed, appellee declined Benson's offer to make up all sums due on account of land, the titles to which had been approved, if appellee and the Reddys would ratify the transfers and give direct deeds (Trans. 361–363).

ARGUMENT.

Complainant cannot Found Her Bill Solely on the Ground of Fraud and Conspiracy and Recover on Some Inferior Ground of Relief Incidentally Set Up in the Bill.

Pages 32 to 48 of appellants' brief were devoted to a discussion of the above heading, and appellee attempts to answer this discussion by claiming that "fraud and conspiracy are mere incidents to the allegations of the facts in said cause." The authorities cited to support this contention are wholly inapplicable.

The quotation of 16 Cyc. 483 is qualified by the quotations at pages 485 and 486, quoted on page 34 of appellants' brief. The statement of Daniell on Chancery Practice, page 382, and the case of Williams vs. United States, 138 U. S. 514, both apply to cases of a bill with a double aspect; that is, to cases where distinct acts of fraud were alleged and facts showing mistake and inadvertence were set up wholly

independent of the allegations of fraud, and in the Williams case the Circuit Court had expressly found that fraud existed, whereas in the case at bar the Court below found that there was not even a suspicion of fraud or conspiracy.

Appellee thus seems to concede the correctness of the rule contended for by appellants, and the question is whether the allegations in the bill bring it within the rule announced by the Williams case.

Appellee asserts in her brief, pages 37 and 38, that the fraud was alleged as a mere incident to the invalidity of this power of attorney, and her summary of the bill of complaint, pages 22 to 28, may lend color to this contention. But this summary is not a fair statement of the allegations of the bill, because a mere cursory examination will show that the charge of fraud and conspiracy are the whole basis and ground-work of the bill, and that they are so interwoven and intermingled with the other allegations as to be practically inseparable from them. If these allegations are eliminated, nothing is left.

The first charge of fraud occurs in Paragraph XI, the preceding paragraphs having been devoted to formal and jurisdictional allegations. After alleging fraud and conspiracy, appellee states her version of the agreement entered into in August, 1900, commencing this statement with the significant words "in this behalf complainant alleges."

In Paragraph XII, pages 13 and 14, she alleges her confidence in Campbell and Benson and the former's alleged false representations as to Benson's reliability.

In Paragraph XIII, pages 14 to 16, she alleges that both Benson and Campbell intended to defraud her and that the deeds were fraudulently prepared, and fraudulently and in furtherance of said conspiracy delivered to Benson.

Paragraphs XIV and XV, pages 16 to 18, allege that the powers of attorney with the names of the agent in blank were surreptitiously and in furtherance of the scheme to defraud inserted among the deeds sent by Campbell to complainant, knowing that she would sign the same without careful examination by reason of her confidence in him.

Paragraph XVI relates wholly to matters occurring after the inception of appellants' title, but it also alleges fraud, falsehood and conspiracy.

Paragraph XVII describes the various powers of attorney.

Paragraph XVIII alleges that the complainant did not know Cobban; that she never knowingly or consentingly gave him a power or powers of attorney; that she never acknowledged the said alleged powers of attorney, and that the certificates thereon are false and forged.

Appellee next alleges that there was no administration on the estate of Patrick Reddy in Idaho, the conveyance from Cobban as her attorney in fact to Weirick, and the issuance of patent (Trans. 29–34).

Paragraph XXIII (Trans. 34–35) alleges that Cobban and Weirick were mere tools and dummies of the Payette Lumber & Manufacturing Company and Benson, and that the whole transaction was a deal between the latter parties and for their benefit.

These are the substantial allegations of the complaint, and an examination of the joint answer of appellants Cobban and Weirick discloses that these allegations of fraud were in every case specifically denied while the existence of blanks in the powers of attorney was admitted. (Trans. 69–74, 78, 83–85.)

This comparison of the complaint and answer shows clearly that fraud and conspiracy was the substantial issue raised by the pleadings, and the record shows clearly that all the attorneys considered this to be the issue on the trial; and the trial court (Trans., p. 499) says: "Moreover, there is no substantial foundation for the charge *elaborated at great length in the bill* that Benson, Campbell, Weirick, Cobban and others conspired to defraud the plaintiff."

If these allegations of fraud are dropped from the bill, what is left? Certainly no cause of action in equity could be stated. There would remain the following: The allegation of citizenship and the jurisdictional amount, that the complainant is the owner of certain described lands in Boise County, Idaho, which are vacant and unoccupied and not in the possession of defendants (and this allegation as to nonpossession is flatly denied by the answers), the description of the base lands, the description of the powers of attorney, the allegations at pages 28 and 29 that appellee did not know Cobban and never knowingly gave him a power or powers of attorney, and that the notarial certificates on such powers were false and forged; that there was no administration on the estate of Patrick Reddy in Idaho; that Cobban

deeded to Weirick as appellee's attorney in fact, and the prayer for relief.

Paragraphs XI, XII, XIII, XIV, XV and XVI cannot be considered, because every one of these paragraphs reeks with charges of fraud and conspiracy, and under the rule contended for in appellants' brief the correctness of which appellee seems to concede, these matters cannot be considered in face of the positive finding of the Court that there was no fraud. The alleged agreement, the alleged escrow, the alleged explanation of the signing of these instruments are thus completely out of the case, and appellee's claim amounts to this: A bill in equity to cancel deeds and powers of attorney brought against *bona fide* purchasers from complainant's attorney in fact, on the ground that she did not knowingly sign the power of attorney under which the conveyance was made; and she attempts to sustain her case on the equity side of the Federal court without proving that she has possession of the land in question or that the lands are vacant, unoccupied and not in the possession of defendants or other parties.

The Pleadings and Proof do not Sustain the Relief Granted.

Appellee attempts in her brief to lay aside the allegations of fraud and to claim that she is entitled to relief in equity on other grounds; but even if the Court could thus change the whole theory of the case, to the prejudice and injury of appellants, and allow this bill to be made the instrument of unfounded slander against these appellants and various other persons, we submit that a cause of action in equity is not shown either by the pleadings or the proof.

Courts of equity have jurisdiction to cancel deeds for fraud or mistake and in appropriate cases to cancel deeds that are clouds on title, but this latter jurisdiction is limited and cautiously exercised.

4 Pomeroy, Equity Jurisprudence, sec. 1377.

6 Cyc. 286.

Field vs. Holbrook, 14 How. Pr. (N. Y.) 103.

Mistake is neither alleged nor proved in the case at bar. 16 Cyc. 66, defines and distinguishes "accident" and "mistake" as follows:

> "The terms 'accident' and 'mistake' have acquired generic and technical senses indicating grounds upon which courts of equity from a very early period have interposed to relieve a party from certain unjust legal burdens. By 'accident' is meant an occurrence unforeseen and not reasonably to be anticipated, whereby the legal rights of a party are affected to his injury without neglect or misconduct on his part. 'Mistake' is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time. An accident is something occurring subsequent to the transaction and reacting injuriously upon the legal rights of the party; it is objective. Mistake is subjective, relating to the mental condition of the parties at the time of the transaction, and thereby affecting the quality of the transaction in its inception."

This definition is substantially that given in 2 Pomeroy, Equity Jurisprudence, sec. 823 and sec. 839, and that author's statement is quoted with approval by the Circuit Court of Appeals of the Fifth Circuit in L. Bucki & Son Lmbr. Co. vs. Atlantic Lmbr. Co., 116 Fed. 1. See, also, California Civil Code, sec.

1577. But these definitions clearly do not touch the facts of the case at bar. Here there was no erroneous conception as to the essentials of the contract. The whole difficulty was stated by the trial court to have been caused by the delivery to Benson of the title papers before he had paid over the money. This was at most a breach of his agreement with appellee or a breach of Campbell's agreement. It is no more a mistake entitling appellee to relief by cancellation than any breach of contract would be.

But counsel seem to contend that these deeds and powers of attorney were filled in or executed without authority, and can therefore be cancelled as clouds on appellee's title. This is apparently the theory on which the trial court proceeded, but the Court failed to recognize that appellee had not proved that these lands were vacant and unoccupied and not in possession of appellant, the Payette Lumber & Mfg. Company. This was an absolute essential to her right to cancellation on this ground, because she admitted in her own complaint that she herself was not in possession. (Trans., p. 3.)

The former strict rule of equity was that bills to quiet title or remove clouds on title could only be brought by the party in possession.

Alexander vs. Pendleton, 8 Cranch (U. S.), 462.

Holland vs. Challen, 110 U. S. 15, 26, 28 L. Ed. 52, 54.

This was on the theory that otherwise the true owner had an adequate remedy at law by an action of ejectment, and this rule was followed in the Federal court without regard to state statutes extending

equity jurisdiction to cases where the defendant was in possession. But in Holland vs. Challen, *supra*, it was held that where the land was not in possession of anyone, the true owner could maintain a bill to quiet his title or remove a cloud thereon, if the State statute allowed such action, because in that case there was no adequate remedy at law. This exception has become as well settled as the rule. See:

So. Pac. Ry. Co. vs. Stanley, 49 Fed. 263.

So. Pine Co. vs. Hall, 44 C. C. A. 363, 105 Fed. 84.

Section 4538 of the Idaho Code extending the scope of suits to quiet title provides as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The rule applicable to such statutes is well stated in the note to Whitehouse vs. Jones (W. Va.), 12 L. R. A. (N. S.) 76, as follows:

> "The question as to the effect on the chancery jurisdiction of United States courts of statutes enlarging equitable jurisdiction in the various states is settled. *The constitutional provision as to trial by jury, and the statutory provision forbidding equity from entertaining jurisdiction where an adequate remedy at law exists, are controlling.* But the constitution and statute are held to refer to the right to trial by jury as it existed at common law. If a State statute enlarging equitable jurisdiction does not deprive a party of the right to trial by jury as it existed at common law, the statute may be followed in the Federal courts; otherwise not. Practically this means that statutes permitting a party in possession to maintain a bill to quiet title, or allowing a party out of posses-

sion to bring an action to remove cloud from title to vacant or unoccupied land, may be given effect in the United States courts; *but statutes opening the doors of equity to a party out of possession, seeking, as against a party in possession, to quiet or remove a cloud from title, cannot be enforced under the United States Constitution and statute.*" (Our italics.)

Numerous authorities are cited to support this text.

In Whitehead vs. Shattuck, 138 U. S. 146, 34 L. Ed. 873, the Court, referring to the Iowa statute which is similar to the section above quoted, said at page 874:

"It thus enlarges the powers of a court of equity, as exercised in the State courts, but the law of that State cannot control the proceedings in the Federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

In the case of Stockton vs. Oregon Short Line R. Co., 170 Fed. 626, section 4538 of the Idaho Code was construed by Judge Dietrich, who said at page 631:

"It will be noted that the Idaho statute does not in terms purport to enlarge the equitable jurisdiction of the State courts; nothing is said about actions at law or suits in equity; no procedure is prescribed. In general terms it declares the right of a party to have adjudicated any claim to or interest in real property when such claim or interest is controverted or questioned, whatever be its nature. It does not abolish existing remedies either at law or in equity. It embraces all condi-

tions, including those where an action in ejectment or a suit to quiet title or to remove a cloud upon a title would, in the absence of the statute, afford adequate relief. It includes and adds to these ancient remedies. *There is no evidence of any intention on the part of the Legislature to abrogate the general rule that suits in equity cannot be maintained where there is a plain, adequate, and complete remedy at law.* Nor could such a purpose, if manifest, be sustained. To do so would, in effect, be to nullify the right of jury trial, solemnly guaranteed by the fundamental law of the state. If, the conditions being such that an action in ejectment may be maintained, a party may, instead of bringing such an action, institute a proceeding under the statute, and if all such proceedings are to be regarded as suits in equity, then by a simple bit of legislative legerdemain a defendant may not only be deprived of his right of removal to the Federal court, but also of his constitutional right to a trial by jury, for, as we have seen, the Constitution guarantees such right only in actions at law. * * *

"As already stated, the plaintiff's complaint here exhibits a case of equitable cognizance within the jurisdiction of this court. If, as is suggested in the briefs of both parties, the complaint does not truly or fully show the material facts, and if the defendant is actually in possession of the premises, the plaintiff may deem it wise to reform his pleading, for if he proceeds upon the equity side of the court he must fail, unless his proofs disclose a right of action cognizable in equity; there must be a correspondence of *allegata* and *probata.* The actual facts should be set forth from which it may be determined whether the court, *ratione materiae,* can entertain jurisdiction, and, if so, whether the cause should proceed upon the equity or upon the law side of the court, or possibly in part upon one side and in part upon the other." (Our italics.)

In Lawson vs. U. S. Mining Co., 207 U. S. 1, 52 L. Ed. 65, a case decided on the Utah statute identical with section 4538 of the Idaho Code, it was said:

> "Of course, as pointed out in Whitehead vs. Shattuck, 138 U. S. 146, 34 L. Ed. 873, such a statute cannot be relied upon in the Federal courts to sustain a bill in equity by one out of possession against one in possession, for an action at law in the nature of an action of ejectment affords a perfectly adequate legal remedy."

Other cases supporting this proposition are:

Wehrman vs. Conklin, 155 U. S. 312, 39 L. Ed. 167.

Gordon vs. Jackson, 72 Fed. 86.

Giberson vs. Cook, 124 Fed. 986.

U. S. vs. Wilson, 118 U. S. 86, 30 L. Ed. 110.

McGuire vs. Pensacola City Co., 44 C. C. A. 670, 105 Fed. 677.

Frey vs. Willoughby, 11 C. C. A. 463, 63 Fed. 865.

Adoue vs. Strahan, 97 Fed. 691.

Davidson vs. Calkins, 92 Fed. 230.

Morrison vs. Marker, 93 Fed. 692.

Taylor vs. Clark, 89 Fed. 7.

The three cases last cited were cases decided under the California statute, which is identical with the Idaho statute above quoted.

None of the cases above cited are open to the criticism found at page 45 of appellee's brief, and many of them involve statutes identical with section 4538 of the Idaho Revised Codes. These cases completely refute appellee's contention that the Idaho statute is controlling, but it may be well to review briefly the cases cited by appellee.

More vs. Steinbach, cited at page 49, cannot be taken as a true statement of the law after the later decisions in Whitehead vs. Shattuck, Wehrman vs. Conklin, and Lawson vs. U. S. Mining Co., *supra,* which all hold precisely to the contrary. The quotation cited from Devine vs. Los Angeles, 202 U. S. 312, is a mere general statement made in a case where complainants had possession and without the necessary qualification that such statutes cannot deprive defendants of their right to a jury trial.

The cases of Darragh vs. Wetter Mfg. Co., Gormley vs. Clark and Cowley vs. Northern Pac. R. R. Co., are cases where there is no adequate remedy at law, and therefore the rule has no application; but in the case at bar, as appellee could not prove that the land was not in the possession of defendants, she should have brought her action on the law side of the Federal court, proved her title, and challenged the validity of the deeds and powers of attorney upon which the defendants would have had to rely. The validity and binding character of these instruments were mere questions of fact on which appellants were entitled to a jury trial, and by this action at law appellee would have had an opportunity to prove her title and to obtain possession, so her remedy at law was complete and adequate.

The case of Sayers vs. Burkhardt, cited at page 44 of appellee's brief, was a case where fraud was alleged and proved, and in such cases the courts may well hold possession to be immaterial. But here the Court has found that fraud did not exist and the jurisdiction of a court of equity must be rested solely on the ground of a bill to quiet title, or to remove a

cloud upon title; and in order to sustain this jurisdiction, appellee was required by her pleadings to prove that the lands were vacant and unoccupied, and not in the possession of defendants or any of them. This became one of the vital and controlling issues in the case, and by reason of the Court's changing the theory on which the case was tried, appellants had no opportunity whatever to meet this issue.

The allegations of Paragraph 7 (Trans. 3, 4) of the complaint in this regard were flatly denied in the answer (Trans. 42, 54, 67, 68), and the burden of proof was on appellee to show nonpossession by defendants and jurisdiction of the cause in equity. Not only did she wholly fail to do so, but the trial Court assumed (Trans. 518) that defendants were in possession.

This review of the authorities shows not only that the change in theory was absolutely prejudicial to appellants, but that appellee wholly failed to prove a cause of action cognizable in equity.

Appellant (Cobban) had Implied Authority to Insert His Name in the Blank Powers of Attorney and to Convey to Weirick as Attorney in Fact for the Appellee.

The proposition stated above has been discussed at length in appellants' first brief (pages 49 to 68), and there will be no occasion for discussing the matter further, except that counsel for appellee have cited and extensively quoted from certain cases some general statements, which, taken by themselves and apart from the facts of those particular cases, might be considered as supporting a proposition different from that contended for by these appellants. It

would seem, however, that the question has been fully disposed of by at least three courts upon the particular facts which we have in this case, all the decisions being in support of appellant's contention. We refer to the decision by the United States District Court for the Northern District of California in United States vs. Conklin, 169 Fed. 177, and the decision of this Court upon the appeal taken in that case reported in 177 Fed. 55; also the decision of the Supreme Court of California in Conklin vs. Benson, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537. An examination of the decisions referred to will show that the facts before the Court in those cases and the doctrines upon which those decisions rest are identical with the case at bar. It is true that in those cases the attorney in fact, Mr. C. L. Hovey, did not insert his own name in the power of attorney; but it is equally true that the powers of attorney there before the Court were executed in blank, and that the blanks were filled in by Benson or someone under his direction. It matters not who filled in the blanks; it is sufficient that they were filled in by someone after they had left the possession and control of Mrs. Conklin and that the instrument when executed by her was identical with the instruments which we have in this case. Counsel for appellee have cited several of the older decisions of the Supreme Court of California in support of their contention. We would respectfully, however, refer this Court to the latest expression of the California court on this question, which is found in Conklin vs. Benson, *supra.* The Court in that case said:

"According to the evidence of plaintiff, these papers were sent from the office of Mr. Campbell to her for signature, and she, relying entirely upon him and believing that they were simply deeds to Benson, signed them and returned them to his office. There was no deposit in escrow of any of these papers, and they were apparently all placed in Benson's possession. The deeds to the United States of the base land were recorded in the proper counties. Benson thereupon proceeded in an endeavor to sell such land as might be selected as lieu land. Defendant Hovey was the agent of defendant Walker, who was making large investments in public lands. He had already had dealings with Benson in such transactions, and in the particular transactions as to Monache lands followed a very ordinary course of business in such matters; viz., selected lieu land as specified by his principal, Walker, indicated such selection to Benson, and upon the production by Benson of proof of the filing of a proper application for lieu lands in the local land office and by delivery of a power of attorney of the owners appointing him, Hovey, attorney in fact to convey the land, paid to Benson the agreed price, subsequently conveying to Walker the selected lands. The powers of attorney bore certificates of acknowledgment by the owners before a notary public, but plaintiff testified that she had never appeared before the notary or acknowledged any of the instruments. Both the other principals, Mrs. Reddy and Edward A. Reddy, and the notary public, died prior to the trial. The evidence is sufficient to support the conclusion of the trial court that so far as the naming of an attorney in fact is concerned, the powers of attorney were blank at the time of the signing by the owner and the placing of the same in Benson's hands, and that Benson on making a sale would put in such blank the name of such person as attorney in fact as was desired by the purchaser. . . . .

"There is no foundation in the facts above set forth for the conclusion that the papers signed by plaintiff were forgeries, and absolutely ineffectual

even to serve as a basis for the application of the doctrine of estoppel. The theory of the learned judge of the trial court appears to have been that all of these papers, including the deeds of the Monache lands to the United States, were in effect forgeries, and absolutely void. The idea underlying this apparently was that plaintiff was so deceived in the matter of executing these instruments as to bring her within the doctrine of certain cases which substantially hold that where a person who has no intention of selling or encumbering his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is just as much a forgery as it would have been had the signature been forged. These decisions are not such as to sustain plaintiff's claim in this regard. The distinguishing feature between all such cases and the case at bar is that here plaintiff fully understood and believed that she would convey all her interest in the Monache lands. She intended to execute papers having this effect. The difference between the papers she thought she was signing, according to her evidence and the papers she actually signed, was merely one of detail and in no degree material, one set of papers having precisely the ultimate effect of the other,—the conveyance of her interest in this land. Her real and only complaint upon her own testimony was her failure to personally receive full payment for her land, claimed to have been occasioned by reason of the failure of her agent to place the papers in escrow to be taken up as payments were made, and the delivery thereof to Benson without payment first having been made. This failure could not make the papers 'forgeries' in any sense of the word."

The Court then cites cases showing that the proposition for which appellee contends in the case at bar has no application to this case, and referring to the question of the acknowledgment, the Court says:

"There is nothing in the law of this State which makes an acknowledgment by plaintiff, or a certificate of such acknowledgment, essential to the validity of any of the papers actually signed by the plaintiff.

"Under such circumstances as are disclosed by the record in this case, the rule established by the overwhelming weight of authority is that the equities of innocent purchasers are protected, even if injury be done to the party who has been imposed upon or defrauded by her agent or original grantee."

It seems to us that the decision of the California Court in the above case is conclusive on the proposition that the failure of appellee to acknowledge the instruments (if the evidence be held to so show), and the fact that they were executed with the name of the agent omitted, do not render the powers of attorney forgeries or ineffectual; and also on the proposition that the fact that the papers were not placed in escrow as appellee assumed they would be, does not affect appellants in this case, who had no knowledge of such an agreement.

The facts before the Court in United States vs. Conklin, 177 Fed. 55, are such as to make that decision equally conclusive as to this case. In that case it was held that the title which the Government received to the Monache lands was good, and that it was unaffected by the fact that the papers did not go through the escrow-holder, or that they were delivered contrary to the intention of appellee. The Court held that the acknowledgment was not essential to the validity of the deed.

Appellee occupies the insistent position of claiming in her complaint as a basis for equity jurisdiction

that she trusted and relied upon Campbell and Benson, and that because of the great confidence and trust reposed in these men she is especially entitled to the aid of equity. But in her brief she insists that Benson and Campbell had no authority in the premises, and that she did not trust them, and that she is not, therefore, subject to the maxim so frequently applied in these cases that "Where one of two innocent persons must suffer by the fraud or negligence of the third, whichever of the two has accredited him ought to bear the loss."

It was appellee who furnished Benson, directly or indirectly, with the instruments which she now seeks to have canceled and by means of which he obtained appellant's money. It is not a question of what his *actual* authority in the premises or as her agent may have been; it is merely a question of whether he was clothed with *apparent* authority to transact the business which appellants had with him. The Supreme Court of California and this court have both held that he had such *apparent* authority and that purchasers of scrip from him will be protected. There is nothing in the record to take either of these appellants, and especially the Payette Lumber and Manufacting Company, out of the doctrine followed by this Court in United States vs. Conklin and by the California Court in Conklin vs. Benson.

Appellee suggests that the Payette Lumber and Manufacturing Company, purchasing from Weirick as trustee, was under obligation to inquire for whom he acted as trustee. It is submitted, however, that that is not a matter concerning appellee. The inquiry

would only be for the purpose of ascertaining whether Weirick had proper authority from the *cestui que trust* to convey or whether he made the conveyance in violation of his duty as trustee. Such inquiry on the part of the Payette Lumber and Manufacturing Company could have led to nothing that would have disclosed the relation between Mrs. Conklin and Campbell and Benson, or whether the latter had in all respects observed their agreements, or performed their duties to appellee.

Respectfully submitted,

RICHARDS & HAGA and

McKEEN F. MORROW,

Solicitors for Appellants.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. M. COBBAN, E. B. WEIRICK, Individually, and also as Trustee, and THE PAYETTE LUMBER AND MANUFACTURING COMPANY, a corporation, Appellant,

vs.

MOLLIE CONKLIN, Appellee.

PETITION FOR REHEARING.

Upon Appeal From the United States District Court for the District of Idaho, Southern Division.

To the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit:

Your petitioners, R. M. Cobban, E. B. Weirick, individually and also as Trustee, and The Payette Lumber and Manufacturing Company, appellants in the above entitled cause, respectfully petition your Honorable Court to grant a rehearing in said cause, and your petitioners especially claim

error in the decision filed herein in the following particulars:

1. This court erroneously assumed that the decision of the District Court rested upon the fraud of Benson and therefore affirmed the decree below on the ground of fraud, when the fact is that such decree rested exclusively upon other grounds, viz., (a) That the powers of attorney to convey were inoperative and void because of certain blanks therein; (b) That the powers of attorney to convey were inoperative, ineffectual and void because they were delivered by what the court considered an escrow holder before there had been a full compliance with certain escrow instructions.

2. This Court erroneously assumed that there is sufficient evidence of fraud upon which to found a decree and that the District Court had based its decree on such fraud, when the record only discloses at most a mistake or misunderstanding on the part of all parties, or a failure of the minds to meet or a failure of the parties to agree as to the understanding reached, and the District Court so found.

3. This Court erroneously held that appellants had waived the objection that the District Court was without jurisdiction because defendants were in possession, and this Court entirely overlooked the fact that such objection could not be raised in the Court below for the reason that under the theory of the Bill possession was not material, as the Bill was based on a conspiracy to defraud and not on mistake or upon the insufficiency of the powers of attorney or the default of the escrow depositary, and the cause was tried upon the theory that the powers of attorney and deeds

should be canceled because of such fraud, and upon such theory the question of possession was immaterial as equity would take jurisdiction on the ground of fraud; whereas the District Court found that it could grant no relief because of fraud, but decided the cause upon another theory which rendered possession essential to jurisdiction. The objection urged is therefore raised at the first opportunity.

4. That a bona fide purchaser for value without notice who purchases from a person in absolute and complete possession of property, and who is and has been paying the taxes thereon, is protected as against the claim of the grantor of such person who claims that the deed from him was delivered by the escrow depositary in violation of his instructions; and this Court erroneously adopted a contrary rule, based upon authorities which show that the alleged bona fide purchaser in such cases had either actual or constructive notice of the escrow or defect in the title.

5. That while this Court correctly held that a bill to set aside a conveyance on the ground of fraud will not sustain a decree granting such relief on an entirely distinct ground of equitable jurisdiction, such as mistake, yet this Court did in fact the very thing which it said could not be done; for the evidence shows conclusively, and the District Court so found, that no two of the parties involved in the transaction understood the agreement in the same way. Mrs. Conklin says the land was to be conveyed direct to Benson and not to the United States. Mr. Campbell denies this, and corroborates Benson to the effect that it was a lieu land scrip transaction, and that the land was to be conveyed to the United States and lieu lands selected and the scrip sold, but disclaims any recollection of powers of attorney to con-

vey. Benson, on the other hand, testifies clearly and is corroborated by the strongest circumstantial evidence, that the agreement was exactly as he undertook to carry it out. These conflicting statements as to the terms of the agreement show conclusively the failure of the minds to meet, and each was proceeding under a mistaken idea as to the agreement that had been reached; but there is not the slightest justification for charging Benson with fraud because the three parties concerned did not all understand the agreement alike. This Court after finding that there was no conspiracy or the slightest fraud on the part of appellants, says: "But the fraud of Benson was proven, and it was the proof of his fraud which justified the decree. Benson fraudulently procured the execution of the powers of attorney in blank, and fraudulently procured the possession thereof after their execution;" whereas, the District Court, after reviewing the facts and finding that the minds of the parties never met on the procedure for accomplishing a transfer of the Monache lands and that the charges of fraud were not sustained, states the basis of its decree as follows: "We are thus brought to a consideration of what seems to be the controlling issue of the case, viz., To what extent, if at all, is the plaintiff bound by the unauthorized delivery of the blank powers of attorney to convey?" And it thereupon proceeds to found its decree upon the propositions that powers of attorney executed in blank are inoperative and void, and that an instrument delivered by an escrow depositary in violation of its instructions is also ineffectual and void; and the question of fraud does not in any degree affect the legal propositions upon which the District Court based its decree.

6. This Court erroneously assumed that there was any evidence in the record to sustain the statement in its opinion that "Benson fraudulently procured the execution of powers of attorney in blank, and fraudulently procured the possession thereof after their execution," the evidence being only to the effect that Benson, in accordance with this agreement as understood by all parties, prepared all papers and sent them to the office of Campbell, Metson & Campbell, and in course of time they were returned to Benson's office signed by plaintiff; and the charge of fraud on the part of Benson in procuring the execution or possession of the powers of attorney, or any other paper does not receive the slightest support from the evidence in the record. Such charge must rest entirely upon the unsupported and abandoned allegations of fraud contained in the Bill.

7. This Court is in error when it says that: "There is no evidence that appellee knowingly and intentionally executed those papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did," when the evidence is uncontradicted that all papers were sent to Appellee at her residence, without any representations from any one as to what they were, and she was allowed to take her own time for examining and re-examining them and for conferring with others over them; that after signing them she returned them to the offices of Campbell, Metson & Campbell, who had all the time they desired, uninfluenced by any one, to examine them both before and after they had been signed by appellee, and some one in that office later and in due course sent them to Mr. Benson's office. The failure of appellee or

her counsel to examine the papers or to understand them, if such be the case, cannot be charged to any act of Benson.

8. This Court and the District Court both fell into the same error, viz., when the proof disclosed the failure of the minds to meet on the procedure for selling the Monache lands, the courts have accepted the version of appellee as correct as to one or two particulars; they have accepted Benson's version as correct in some particulars, and have accepted some statements from Campbell's testimony. They have believed and disbelieved each in part, and out of these irreconcilable fragments from the testimony of each both courts have evolved a new contract, which is not the contract which appellee thought she had entered into nor the one that Benson understood he was a party to, nor the one that Campbell understood the parties had agreed upon. It is undeniably and exclusively the contract of the court, and it is respectfully submitted that appellants, who are innocent in fact and who purchased for a valuable consideration without notice or knowledge of such contract, should not be made to suffer because Benson or Campbell, or both, failed to comply with all the terms thereof.

9. The Court erroneously assumed that the powers of attorney to convey were to be placed in escrow, to be delivered under certain instructions and upon certain conditions; whereas, appellee, both in her evidence and in her Bill, strenuously contended that there were to be no powers of attorney whatsoever, but that the transaction was to consist simply of deeds conveying the lands directly from her to Benson; and it is only the agreement evolved by the Court, as aforesaid, out of the irreconcilable fragments of conflict-

ing evidence that provides for the powers of attorney to be placed in escrow.

10. The Court overlooked the proposition that the act of an agent cannot be ratified in part and disaffirmed in part; that the principal will not be allowed to claim that which benefits him and repudiate the rest, and that appellee cannot claim the benefit of Benson's and Campbell's acts as to the exchange of the Monache lands for the lieu lands in Idaho, and repudiate the balance of the transaction.

Your petitioners in this petition simply aim to show that there is sufficient probability of error in the decision filed to justify a rehearing and a reargument of this cause, and your petitioners do not herein undertake to discuss or cite the many authorities bearing on the questions raised. In support of the errors alleged the following brief argument is submitted.

ARGUMENT.

The District Court Did not Base Its Decree on Fraud.

This Court erroneously assumed that the District Court founded its decree on fraud. Had it done so it would have been reversible error, for it is respectfully submitted that there is no such fraud disclosed by the record as to set aside the title of a bona fide purchaser for value, and we think it would be a gross injustice to the trial court to charge that its decision and the decree appealed from rested on such flimsy evidence as that produced by appellee in support of the allegations in the Bill, recklessly charging a conspiracy on the part of all to defraud her out of her lands.

The Trial Court instead of finding fraud found that the

minds of the parties had never met as to the procedure for effecting a transfer of the Monache lands, and that there was therefore an honest misunderstanding, and that the hasty suspicion which appellee and her son had formed or entertained towards Campbell and Benson rested simply upon the fact that the parties proceeded to carry out the agreement as each understood it, not knowing that they did not all understand it alike. The evidence in the record shows conclusively that Benson understood the agreement to cover or embrace the procedure which he was attempting to carry out. The Trial Court said on this question:

> "The truth probably is that, upon the one side, the plaintiff, not being familiar with the procedure by which base lands are exchanged for lieu lands, gave little attention to, and did not understand, such explanations as may have been made by Benson, and went away with the impression only that Benson was to purchase, and that she was to deed to him directly, her interest in the base lands. Upon the other hand, Benson, being advised of the conditions under which base lands could be handled and exchanged, and being familiar with the procedure, understood that the owners would execute, and, in due time, deliver such papers as were necessary to make the exchange and transfer. The plaintiff wanted to sell the lands and was interested particularly in procuring the desired price. Being concerned only with the ultimate result, she probably gave very little thought to the means by which that result would be reached. In view of the entire record. it is wholly improbable, and I am unable to conclude, that Benson agreed or that he understood, that he would directly purchase the base lands, or that deeds from the then owners were to convey the title to him personally."

This falls far short of charging Benson with fraud. On page 499 of the transcript the learned District Judge says, in his opinion:

> *"Moreover, there is no substantial foundation for the charge, elaborated with great length in the bill, that Benson, Campbell, Weirick, Cobban and others conspired to defraud the plaintiff."* (Our italics).

This Court apparently overlooked the fact that the trial Court exonerated not only appellants but Benson and Campbell from the charge that they had in any way conspired to defraud plaintiff. Referring to appellants alone, the Trial Court said (Trans. p. 499):

> "So far as Cobban and Weirick are concerned together with their associates and the promoters and officers of the defendant Payette Lumber & Manufacturing Company, it is enough to say that there is no basis for a suspicion even that they purported to defraud or consciously participated in any scheme or conspiracy to defraud either the United States or the plaintiff."

And referring to Campbell, the Court said (p. 499):

> "While there is much in the record to support the fact that Campbell failed to properly discharge his obligations to the plaintiff, it cannot be held that he conspired with Benson, or at any time entertained corrupt or improper motives."

The most that can be said against Campbell is that he did not give much personal attention to the transaction, and the most that can be said against Benson is that he did not pay over to Campbell or appellee all the money that he received from the sale of the scrip, and that the letter which he

wrote to Campbell in December, 1909 (Complainant's Exhibit N.-1, p. 476), did not go sufficiently into detail and did not fully disclose what had been done or accomplished; but it should be noted in this connection that Mr. Benson assumed and he had a right to assume that Campbell understood the agreement as he understood it, and that Campbell knew that powers of attorney to convey formed a part of the transaction and that they had been executed and delivered to him. This conclusion Benson had a right to entertain, because all the papers had gone through Campbell's office twice before they were used by Benson, and there had been ample opportunity for everyone in Campbell's office to examine them and become familiar with their contents. The papers had all been prepared by Benson and transmitted to the office of Campbell, Metson & Campbell for their examination and approval, and, if found correct, then they were to forward them to appellee.

The record shows further that Campbell, Metson & Campbell sent the papers to appellee, including the powers of attorney to convey; that they were received by her, either at her residence or hotel, without any representation that they were all alike or were of any particular kind; they were left with her to examine and consider in her own way and in her own time. She could examine them and re-examine them and confer with anyone she pleased. She signed them all and returned them to the office of her attorneys, who had a second opportunity to examine and become acquainted with their contents, and who thereupon, through some one in the office other than Mr. J. C. Campbell himself, delivered them to Mr. Benson. IS THERE

THE SLIGHTEST FOUNDATION FOR THE CHARGE THAT BENSON FRAUDULENTLY PROCURED THE EXECUTION OR THE POSSESSION OF THESE POWERS OF ATTORNEY, OR ANY OTHER PAPERS?

> "Fraud or breach of trust ought not lightly to be imputed to the living; for the legal presumption is the other way; and as to the dead who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt. Story, J. Prevost v. Gratz, 6 Wheat. 498."
>
> "To constitute fraud, the intent to deceive must clearly appear."
>
> McGee v. Manhattan L. Ins. Co., 92 U. S. 98.

The trial court does intimate in its decision that Benson in his letter of December 11, 1901, was putting appellee's claim for payment off by "evasion and deception." This letter, however, was written long after appellant Cobban purchased the scrip, and the statements of the court were made not for the purpose of showing that charges of fraud on Benson's part were sustained, but the statement was made in connection with appellant's contention that appellee was barred by her laches, the court in effect saying that the letter did not fully apprise appellee of all the facts. It should be noted also that when Benson wrote this letter it is conceded that none of the titles to the base lands had been approved, and that appellee was therefore not entitled to any payment under her contract with Benson; but, notwithstanding this, Benson had already advanced her $2750.00 on the purchase of the Monache lands. Mr. Camp-

bell testified that all payments were made before November 4, 1901, (pp. 354-355), and appellee alleges in her bill that the amount she received was paid before August, 1901 (trans. p. 18).

The letter states that nearly all the scrip had been sold under contracts, by which payments were to be made by the purchaser only after approval of the titles and execution of a deed by the owner. This statement was subject to some criticism from the trial court because appellant Cobban had paid for his scrip before the letter was written. However, the title had not been approved, and had the title failed, Benson would have been required to return the money to Cobban. In any event, appellee would not have been entitled to both the money and the base lands.

There is nothing to show that the remaining two-thirds of the base lands or Monache scrip had been sold and paid for. The charge, therefore, made in the opinion of this Court that "Benson fraudulently procured the execution of the powers of attorney in blank, and fraudulently procured the possession thereof after their execution," we respectfully submit is not sustained by either the evidence or the opinion of the court below, but must rest entirely upon the charges of the bill and the unsupported statements in appellee's brief.

The trial court, after reviewing the facts, proceeds to give the basis of its decision as follows (transcript, p. 508): "*We are thus brought to a consideration of what seems to be the controlling issue of the case, viz., to what extent, if at all, is the plaintiff bound by the unauthorized delivery of the blank powers of attorney to convey?*" And the court

then proceeds to give several reasons why the decision of the Supreme Court of California in Conklin v. Benson, 159 Cal. 785, 116 Pac. 34, does not control the case, but nowhere does it show that the distinction arises because of any element of fraud.

The opinion in this court, therefore, not only erroneously assumes that the decree below was founded on fraud, but it does the trial court an injustice by holding that the trial court found fraud to exist when it had no such intention and did not so find; and appellants are further wronged by having the cause decided upon a theory which it was assumed had been entirely eliminated from the case, and which, therefore, was not presented upon the original hearing, because it was assumed by all parties that the element of fraud had not been proved, and that the decision below rested entirely on the validity or invalidity of powers of attorney executed in blank and delivered in violation of certain assumed escrow instructions.

Question of Jurisdiction Not Waived.

This court correctly holds that where a plaintiff founds his bill on fraud he cannot recover on another ground of equitable jurisdiction. It says:

> "We may concede the doctrine which is contended for, that relief must be founded upon and consistent with the facts set up in the bill, or with some theory of the case on which the bill is based, and that a bill to set aside a conveyance on the ground of fraud will not sustain a decree granting such relief on an entirely distinct ground of equitable jurisdiction, such, for instance, as mistake."

But, as we read the opinion, the Court does the very thing which it says cannot be done, for the record in this case shows mistake—the failure of the minds to meet, or the execution of papers without fully understanding their contents—and not fraud. That appellee made a conspiracy to defraud the frame and texture of her bill must be conceded; and it must likewise be conceded that the decision of the trial court rests entirely on the theory that the powers of attorney to convey were ineffectual and void because they were executed in blank and delivered without authority. And it must likewise be conceded that Benson acted in a way that was most open and frank in submitting the papers to appellee's counsel for her signature, and that they were in turn delivered to Benson by her counsel without the slightest evidence of fraud or deception on the part of Benson; and it is only the execution and delivery of the papers that can affect the title of these appellants. They cannot be divested of their title by subsequent proceedings, or letters, or communications, written or had, or defaults of Benson after the title papers passed into appellant's possession.

A distinguished writer on equity jurisprudence says that actual fraud may "in its extrinsic nature be reduced to two essential forms—false representation and fraudulent concealments."

2 Pomeroy, Eq. Jurisprudence, Sec. 875.

The procedure followed by Benson in preparing the papers, submitting them to appellee's counsel, and receiving them back was in exact accordance with the agreement as he understood it, and he acted in as open and frank a manner

as it was possible for a person to act. The evidence is uncontradicted that Benson understood that the agreement which had been entered into clearly provided that these powers of attorney were to be executed and turned over to him as a part of the scrip papers, to be sold in the only manner that scrip was being sold. (Trans. pp. 384, 396, 401, 403-404, 420, 426-427, 435, 439.)

Mr. Cobban testified that he had purchased a large amount of scrip and was thoroughly familiar with the business, and that the manner in which Benson handled the scrip involved in this case was the customary manner followed by scrip dealers. He says, (trans. p. 262):

> "It is the usual custom, and was the case in every selection covering some two hundred selections which I handled at that time. And I will further state that not only myself, but I was familiar with the methods being pursued by all the large companies at that time acquiring lands in that vicinity."

It was the only manner in which the scrip could be sold to advantage, and it is doubtful if it could have been sold at all in any other manner. Mr. Benson, as a scrip dealer, naturally had in mind in his negotiations the course that was universally followed in the handling of such scrip and he cannot under the circumstances be charged with the intention to defraud.

When the transaction is considered in its entirety it will be seen that unlimited and unrestricted opportunity was given appellee and her counsel at every step to raise objections that the real agreement, as they understood it, was not being carried out by Benson. N. E. Conklin, appellee's son,

went over the forms of deeds to the United States and aided Benson in preparing the same. (See testimony of Mr. Benson, trans. pp. 387, 389, 490, 419, 420, 440, 442, 452, 453; and of Mr. Lavenson, pp. 365-366; and of Miss Glover, pp. 370, 372, 374.)

Appellee says she read some of the deeds that she signed. If she did, she must be held to know that they were deeds conveying the lands to the United States and not to Benson, for these deeds clearly so state on their face. (See deed, trans. p. 454.) It should be noted also that appellee received two payments, aggregating $2750.00, long after she signed the papers in question, and that she received the money not from the Anglo-California Bank, through whom she says the money was to be paid, but from Mr. Campbell, who in turn received it from Mr. Benson. This is most significant in view of the contention of appellee that the papers were to be placed in escrow with the bank referred to, and the money paid through said bank. It is strong corroborative evidence of Campbell's and Benson's testimony that there was to be no escrow. It is strange, to say the least, that appellee did not become suspicious, if not curious to ascertain how Campbell could have secured the money from the bank without an order from her.

If the original agreement contemplated an escrow it would seem that the escrow feature was waived when the payments were made direct to Campbell and accepted by appellee. It would seem that Mr. Campbell was clearly of the opinion that no escrow was contemplated, or he would not have asked or demanded that Mr. Benson pay the money direct to him. All the circumstances contradict both the

bill and the testimony of appellee, and corroborate in the strongest manner the evidence of Benson and of Campbell regarding the escrow.

There being no fraud on the part of Benson in procuring the execution or the possession of the papers, but at most a mistake in not understanding the agreement as appellee understood it, there can be no foundation for the contention that the decree nevertheless can or may rest on fraud, and the rule announced in Eyre v. Potter, 15 How. 41, and Price v. Berrington, 7 Eng. L. & Eq., 260, and other cases cited on page 18 of appellants' brief in support of this proposition, and the rule as approved by this court in its opinion, must therefore defeat recovery by appellee, for the theory upon which the cause was decided by the court below is neither the theory of the bill nor the theory upon which the case was tried. Equity has jurisdiction on the ground of fraud regardless of possession, and as the whole frame and texture of the bill was a gigantic and vicious conspiracy to defraud appellee that was necessarily the controlling issue upon which proof was submitted. Individual fraud was not charged or claimed. The attack on appellants' title was because of the fraud which it was claimed they had participated in through the alleged conspiracy. On that issue possession was immaterial. But when the court below found that the charges of fraud had not been proven yet granted relief on the new theory that the powers of attorney to convey were ineffectual, for the reason that they had been executed in blank and had been delivered in violation of escrow instructions, the situation entirely changed, and the question of possession thereupon immediately became essential to the jurisdiction of the court. There was then

no opportunity to meet the question in the court below. The evidence had been taken and the cause submitted before counsel knew that this new theory would be advanced by the court. It was raised in this Court, which was the first and only opportunity appellants have had to present the question. It is submitted, therefore, that this Court is in error when it says in its opinion that this question was waived in the trial court.

Appellee Is Not Entitled to Relief on the Ground of Mistake or Cancellation of Clouds on Title.

Mistake was not pleaded in the bill, and there was no attempt to recover on that ground; yet the proof shows that the difficulty arose through mistake and not through fraud. The minds of the parties never met; the trial court so found and the record so conclusively shows. It is clearly a case of misunderstanding, but there can be no relief in this case on that ground as the theory of the suit was a conspiracy to defraud. It is not a suit to remove a cloud on title or to cancel instruments executed through mistake or inadvertence, or without a clear knowledge of their contents.

Mistake will not entitle a party to affirmative relief as against a bona fide purchaser without notice.

2 Pomeroy, Equity Jurisprudence, Sec. 776.

Hence if mistake had been alleged it would not have availed appellee as against these appellants, who bought the scrip for value in the ordinary course of business, and without notice of any infirmities in the title, and in no event could appellee recover as against the appellant Payette Lum-

ber and Manufacturing Company which paid full value to appellant Weirick, relying upon the record title.

Execution of papers by mistake does not render them void, and a purchaser in good faith, without notice of the mistake, is, under all the authorities, protected in his title.

The Agreement Evolved by This Court and the District Court Is Not the Agreement of the Parties.

We think both this Court and the court below inadvertently fell into the error of attempting to construct an agreement out of fragments from the conflicting testimony of appellee, Campbell and Benson, and, in doing so, an agreement was evolved that can by no possible means be recognized as the agreement upon which appellee based her bill, or as the agreement which she thought she had entered into; neither is it the agreement of Benson, and it is not the agreement that Mr. Campbell understood the parties had reached, and under which he played an important part. It is disowned by them all; it is neither "flesh, fish, or fowl." It is not a workable agreement, or one that the parties could or would have entered into with any expectation of carrying out. Appellee alleges in her bill and testifies most clearly that the agreement, as she understood it, provided that she should convey the lands direct to Benson and not to the United States; that the deeds were to be placed in escrow in the Anglo-California Bank, to be paid for in ninety days and delivered as paid for, on the basis of $3.80 per acre. She is positive that there were no other papers to be executed, and the gravamen of the conspiracy alleged in the bill is the fact that other papers not embraced in the agreement, were submitted to her and signed without she having first

been made acquainted with the contents thereof. She strenuously insists that powers of attorney to convey had never been thought of in connection with this agreement.

This Court and the court below have accepted only so much of her testimony as relates to the price of $3.80 per acre, and that an escrow of some kind had been considered. Campbell testifies that there was to be no escrow, but that the land was to be deeded to the United States and the lieu land selection rights, or scrip, sold. The procedure does not appear to have been clearly understood by him. He has no recollection of any powers of attorney to convey, although the court found (trans. p. 495), and Campbell so testified, that he took the notary, Holland Smith, to the hospital in order to secure the acknowledgment of Edward A. Reddy, and among the papers which were at that time signed and acknowledged by Mr. Reddy were powers of attorney to convey (Exhibits D and L, pp. 469, 474).

The Court has apparently accepted only that portion of Mr. Campbell's testimony which was to the effect that the lands were to be conveyed to the United States and the scrip sold. Mr. Benson's testimony agrees with Campbell's in this, that it was to be a scrip transaction, and the base lands were to be conveyed direct to the United States. Benson and Campbell also agree that there was no escrow either thought of, considered, or agreed upon. Benson, however, is the only one who clearly and positively testifies that powers of attorney to convey were to be executed and delivered as part of the scrip transaction.

In short, we have, therefore, the testimony of Campbell and Benson that there was to be no escrow, and the testi-

mony of Mrs. Conklin that there were to be no powers of attorney, but that deeds to Benson were to be placed in escrow.

The composite agreement evolved by the court out of these inharmonious elements includes Benson's version of the agreement that powers of attorney to convey were to be executed, but it places such powers of attorney in escrow against the unqualified testimony of Campbell and Benson that there was to be no escrow, and against the positive charges of the bill and testimony of Mrs. Conklin that there were to be no powers of attorney. This new agreement also recognizes that the deeds were to run to the United States and to be filed for record immediately, and that applications for the selection of lieu lands and powers of attorney to make such selections were to be executed and delivered to Benson for sale, with only the powers of attorney to convey held back in escrow. Hence there is created a contract which is neither the contract of Conklin, Campbell or Benson, and it is not surprising that all the parties failed in some respects to comply with its terms.

But it is submitted that there can be no justification for charging Benson with fraud because he violated the terms of a contract which did not exist in the minds of any of the parties to the transaction. The record clearly shows that the parties were attempting to put themselves in a position to sell the scrip under the act providing for lieu land selections. By closing the deal and conveying the lands to the United States and placing the deeds of record before October 1, 1900, the grantors could avoid the effect of the Act of June 6, 1900, limiting lieu land selections to surveyed

lands (trans. pp. 391, 392). It was to the interest of all parties to expedite matters and get the deeds recorded before that date, hence the application of Campbell to the Superior Court for an order in the Estate of Patrick Reddy, authorizing the conveyance by that estate to the United States of the estate's interest in the Monache lands. This order was procured on September 19, 1900 (trans. pp. 457-462), and recites on its face that it was for the purpose of securing lieu land scrip in lieu of the Monache lands.

It was agreed also that no money was to be paid until the title to the Monache or base lands had been approved by the Government (trans. pp. 326-327, 337, 338, 357, 361, 386, 437, 448, 496). It was likewise understood that Benson would have to sell the rights to select, or the scrip, in order to raise the $3.80 per acre to be paid to the owners (trans. pp. 351, 352). The title to the base lands could not be approved under the law until the abstracts were offered in connection with the application to select lieu lands, hence it necessarily follows that the selection of lieu lands was a part of the deal. Lieu lands, on the other hand, were only to be selected by those who purchased the scrip. It was not the intention of Mrs. Conklin or the Reddy estate to simply exchange the Monache lands for lands in other states, and the scrip could not be sold unless the purchaser was given the means for procuring title to the lands which he might select. Such means consisted of the powers of attorney to convey the lands selected to the purchaser of the scrip, or those whom he might nominate.

The placing of any of these papers in escrow would absolutely defeat or block the very purpose and object sought

to be accomplished by appellee and her co-owners. No scrip could be sold under such an agreement, and the evidence is clear and the court so found that Benson was not to pay for the land until he sold it, and the Court has also found that it was to be a scrip transaction, and the evidence will justify no other conclusion. Mr. Benson being familiar with the selling of lieu land scrip would not have proposed and would not have consented to becoming a party to an agreement which could not possibly have been carried out, hence, Campbell's and Benson's testimony to the effect that there was to be no escrow is corroborated by the strongest circumstantial evidence.

The court below resorted to the intervention of the escrow of the powers of attorney to convey, because it felt that would operate as a protection to appellee. Aside from the fact that the placing of the powers of attorney in escrow is not sustained by the testimony of any witness or the slightest evidence of any kind, it is rendered absolutely improbable from the fact that the intervention of such escrow would have defeated the purpose sought to be accomplished, viz., the sale of the scrip. The universal custom in the sale of such scrip was to deliver to the purchaser the powers of attorney to convey with the selection papers, so that if the title to the base was approved by the Government the purchaser would be protected in his selection. The decision, therefore, rests upon an assumed agreement that never existed, and which the court cannot in justice to the parties evolve from anything contained in the record.

The Assumed Irregularities in the Powers of Attorney to Convey or in the Delivery Thereof to Benson Do Not Justify Decree in Favor of Appellee.

Where the frame and texture of the bill and the gravamen of the charge is conspiracy to defraud, relief cannot be granted because of assumed defects in the powers of attorney to convey, or because the escrow holder, innocently and without the slightest intention to defraud, parted with the possession thereof. This has already been discussed, and we do not intend to consider it but briefly in this connection. We are convinced, however, that the Court has given undue importance in this case to these powers of attorney being executed in blank. Whether being so executed rendered them void or voidable or ineffectual for any reason, it could at most serve as a basis for an action in ejectment if defendant be in possession, or for a suit to remove a cloud or cancel the instruments if plaintiff be in possession.

The Court having found that powers of attorney to convey were a necessary part of the agreement to sell the scrip, there could be no fraud in securing their execution or submitting them to appellee for her signature, and in no event can fraud be charged in this case in connection with the execution or delivery of these documents; for, as we have heretofore shown, they were submitted in the most open and frank way to counsel for appellee, who could take all the time they desired to examine them; they in turn submitted them to appellee, who was left alone at her home to examine them at her leisure and confer with her friends or counsellors as to their contents or meaning. After signing them she returned them to her counsel who were not re-

stricted in their further examination of them, and they in turn sent them to Mr. Benson's office.

The testimony of Mr. Benson is clear and positive that he always understood these powers of attorney were to be executed and sent to him. He is corroborated by the universal custom prevailing in such cases and by the absolute necessity for having such documents in order to sell the scrip. Hence there was no fraud, and the statement of this Court, that Benson "fraudulently procured the execution of powers of attorney in blank, and fraudulently procured the possession thereof after their execution," receives, in our opinion, no corroboration from the record. As found by the court below, the most that can be said is that there was a mutual mistake or a failure of the minds to meet; that there was in fact no agreement, because no two persons understood it alike.

Such being the case, the decision of the Circuit Court of Appeals of the Eighth Circuit, in Burk v. Johnson, 76 C. C. A. 567, 146 Fed. 209, covers the situation exactly. The Court there said:

> "The gravamen of the bill is the alleged false and fraudulent representations of defendant, and the decree must be sustained, if at all, upon proof of the specific and definite fraud alleged in the bill. 'The rule that the court will only grant such relief as the plaintiff is entitled to upon the case made by the bill is most strictly enforced in those cases where plaintiff relies upon fraud. Accordingly, it has been laid down that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any

other ground.' Daniell's Ch. Pl. & Pr., Vol. 1, page 380; Eyre v. Potter, 15 How. 41, 56, 14 L. Ed. 592; Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801. Attention is called to the foregoing rule because of a claim that the decree below might be supported on proof of a mutual mistake. We do not wish to be understood as intimating that the proof shows such a mistake, but the rule is alluded to for the purpose of sharply defining the issue before us. The questions arising on this appeal will be stated as the opinion progresses."

The fact that the powers of attorney were executed in blank would not, even though the matter could be considered in this case, operate to sustain the decree below. Appellant Cobban had implied authority to insert his own name in these documents and to convey to Weirick as attorney in fact of appellee. This question is fully discussed in our former brief (pp. 49-68 of appellant's brief). In addition to the authorities there cited and the questions there discussed, we desire in this connection simply to call the Court's attention to the proposition that the record is uncontradicted that the custom in the sale of lieu land scrip was to handle the matter in the very same manner that was followed in this case; that is to say, the papers furnished to Mr. Cobban when he paid for the scrip were the kind and of the form universally and customarily furnished in the purchase of such scrip. (See testimony of Cobban, pp. 261-262.)

In determining the apparent authority of an agent, consideration must be given to the custom prevailing in the business transacted by the agent. The Supreme Court of Oregon, in Durkee v. Carr, 38 Ore. 189, 63 Pac. 117, states the rule clearly. The Court there says:

"The rule is elementary and universal that every grant of power by a principal to his agent, where no limitations are apparent, is to be construed as carrying with it as an incident thereto, the authority to do all things proper, usual, necessary, and reasonable to carry into effect the objects and purposes sought to be accomplished by the authority conferred."

In 1 Am. & Eng. Encyc. of Law, 996, 997, the rule is stated thus:

"Parties in entering into contracts are presumed to have in view the established usages and customs of the particular trade or business with reference to which they are contracting. Third persons in dealing with an agent have a right, therefore, to presume that he has been clothed with all the powers with which, *according to the custom of that particular business, similar agents are clothed;* and the usages of the business are properly admitted for the purpose of interpreting the powers given the agent. (Our italics.)

"The principle is elementary and uniform that a power given an agent in a transaction carries with it the authority to do whatever is usual and necessary to carry into effect the principal power. And this applies as well to special as general agents, unless the manner of doing the particular act is prescribed by the power."

In 2 Am. & Eng. Ency. of *Law & Practice,* 970, the same rule is stated, and in addition thereto it is there said:

"That he has authority to adopt the usual and ordinary means of accomplishing the business with which he is intrusted, unless such implied authority is expressly negatived by the principal."

In this case the custom was to furnish the purchaser

powers of attorney in blank, and for the purchaser to insert his own name or the name of his agent or nominee as the attorney in fact, and to insert the description of the land which he desired to select or convey, as the case might be. For what purpose could a scrip agent be presumed to have possession of the powers of attorney to convey if he has no authority to fill in the blanks?

We submit there can be no merit in the contention that Cobban did not have implied authority to do what was done by him in this case.

The proposition that the escrow holder violated the escrow instructions is, for the reasons heretofore stated, a matter that cannot be considered in this case. There was no fraud on the part of Benson in procuring the possession of the powers of attorney or any other papers, and the lower court did not base its decree on that ground. It based it upon the technical proposition that as a matter of law a deed delivered by an escrow holder in violation of his instructions, regardless of the motive, was inoperative and void. We insisted before and we still insist that the court cannot base its decree on that ground, after it has found that there was no conspiracy to defraud. But we further insist that if the proposition could be considered in this case, the court would still be wrong, and this for two good and sufficient reasons:

First. The assumed escrow agreement under which the court decides this proposition is not the agreement of the parties. This, we think, we have heretofore sufficiently shown.

Second. The cases cited by the court in support of the proposition are by no means controlling. It will appear upon examination that in those cases there were other good and sufficient grounds for sustaining the decision; that the alleged bona fide purchaser had actual or constructive notice of defects in the papers or in the title. We submit that there is no modern authority, where the recording laws have been taken into consideration, supporting the proposition that, where a purchaser purchases a tract of land without any actual or constructive notice of defects in the title, and where the grantor is in possession of the property, paying and having paid the taxes thereon during preceding years, and surrounded by all the *indicia* of ownership, he will not be protected by the court from the claim of a person that a deed in the chain of title had been carelessly or otherwise delivered by his escrow agent in violation of his instructions. Such doctrine sets at nought the recording acts of the State. The records can no longer be relied upon by a purchaser. He is at the mercy of all grantors appearing in the chain of title. They may at any time set up the claim that their deeds had been taken out of escrow without a full compliance with the instructions. This doctrine would afford fruitful opportunities for unscrupulous persons to defraud the last purchaser.

There can be no good reason assigned why a grantor, who selects an escrow agent to deliver his deed, should not, as between himself and an innocent purchaser, bear the loss if the agent proves unfaithful or untrustworthy. (See authorities cited, pp. 80-90 of appellants' brief.)

What was said by the Supreme Court of Wisconsin in

Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486, relative to a decision of Chief Justice Marshall in United States v. Nelson, 2 Brock, 64, on the question of filling in blanks, applies with equal force to the proposition that an innocent purchaser for value must be sacrificed for the careless grantor who has selected an incompetent or unfaithful escrow agent. The court said:

> "They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away."

That the appellant, Payette Lumber and Manufacturing Company, was a purchaser for value without notice and entitled to the protection of the court, is fully discussed at pages 68 to 80 of appellant's brief, and we think it is unnecessary to add anything to what was there said.

This Case Cannot Be Distinguished From Conklin v. Benson, 159 *Cal.* 785, 116 *Pac.* 34.

The court below attempted to distinguish the decision of the California Supreme Court in Conklin v. Benson, *supra.* It says (trans. p. 509):

> "In that case it was found that when the powers of attorney were, by Benson, delivered to the purchaser, they were complete, and the inference is drawn that they were in that condition when they left the plaintiff's hands. Here it is conceded that when the plaintiff signed the instruments, and indeed until some time after they were delivered to Cobban, they were blank, at least as to the name of the person authorized to exercise the specified powers."

We may add that in the respect mentioned, the California

case differs from the case at bar, but there can be no just claim made that there is any other difference between the cases. The distinction mentioned above between the two cases cannot, for the reasons heretofore stated, affect the decision in this case.

The other distinctions which the District Court attempts to make rest upon a pure conjecture as to what the record showed in the California case and on the assumption that appellee, Campbell and Benson, had testified differently in that case from what they did here. It is submitted that there is no foundation in the record for any other distinction between the California case and the case at bar than that which pertains to the blanks in the powers of attorney.

WHEREFORE, your petitioners respectfully submit that a rehearing should be granted in this cause, for this Court has clearly misapprehended the grounds upon which the district court based its decree, and it has erroneously assumed that appellants waived in the trial court the question which they had no opportunity to present until they reached this court, and it has decided the cause upon the violation of an assumed contract, which is not the contract of the parties, and which in no event is before the Court in a suit on a conspiracy to defraud.

Respectfully submitted,

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Petitioners.

I, Oliver O. Haga, of counsel for petitioners above named,

do hereby certify that in my judgment, the foregoing petition is well founded, and that it is not interposed for delay.

Oliver Hagar

Solicitor and of Counsel for Petitioners R. M. Cobban, E. B. Weirick and Payette Lumber and Manufacturing Company.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

R. M. COBBAN, E. B. WEIRICK, Individually, and also as Trustee, and THE PAYETTE LUMBER AND MANUFACTURING COMPANY, a Corporation,
Appellants,

VS.

MOLLIE CONKLIN,
Appellee.

No. 2236.

PETITION FOR REHEARING

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

To the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit:

Leave of court having been first had and obtained, we, as friends of the court interested in another action that may be affected by the judgment in this case, hereby petition your Honorable Court to grant a rehearing of said cause for the reasons hereinafter set forth:

By her bill complainant claims to be the owner of an undivided one-half interest in certain real property situate in the State of Idaho, referred to as "lieu lands," (Trans., page 3) and bases her claim on allegations in substance as follows: That she owned an undivided one-half interest in certain lands situated in California, referred to as "base lands," (Trans., page 7), and which she had agreed to sell to John A. Benson for the sum of Four ($4.00) Dollars per acre, and to execute deeds therefor in favor of said Benson, to be placed in escrow, and thereafter to be delivered to Benson upon payment of the purchase price (Trans., page 12). That, in reliance upon certain false and fraudulent representations of her attorney, Joseph C. Campbell, and of said Benson, she signed certain instruments, believing them to be deeds to Benson to be placed in escrow in accordance with the agreement (Trans., page 14), but which in fact proved to be deeds conveying the "base lands" to the United States, applications to select "lieu lands" in place thereof, and powers of attorney to convey the "lieu lands," in which powers of attorney the names of the donees of the powers were left blank (Trans., page 17). That, at the time these papers were sent to her for her signature, she did not examine them, believing and relying upon the representations and promises of Benson and Campbell, and on that account she signed all the papers without examination, believing them to be the deeds drawn in accordance with the agreement, and returned these papers, so signed, to Campbell, believing that he would place, or cause the same to be

placed, in escrow, and wholly protect her interest (Trans., pages 16 and 17), but that said Campbell delivered same to Benson contrary to the agreement. (Trans., pages 15 and 16.) That said Campbell and Benson had conspired with defendant Cobban and his associates to so induce complainant to surrender said "base lands" to the United States and thereby obtain and dispose of said "lieu lands" (Trans., pages 11 and 12), and that said Campbell wrongfully and fraudulently, and in furtherance of said conspiracy, made the representations aforesaid to said complainant (Trans., page 15), and that she did not knowingly sign, or authorize any person for her to sign, said alleged powers of attorney, and that they, and each of them, were made wholly without complainant's knowledge or consent, and are false and forged (Trans., pages 28 and 29), and that complainant remained in total ignorance of the true facts, and all the time believed that the deeds she had signed conveyed the "base lands" to Benson, and had been placed in escrow, until a short time before the action was commenced (Trans., page 18).

The Bill of Complaint further alleges that complainants have received only a portion of the purchase price (Trans., page 35), and that the "base lands" were in fact surrendered to the United States and the "lieu lands" patented by the United States in the name of said complainant and her co-owners of the "base lands" (Trans., pages 33 and 34), and that thereafter said Cobban executed a conveyance of said "lieu lands" in the name of said patentees, by himself as attorney in

fact (Trans., page 30), and that the other defendants claim under this deed.

The trial court determined and decreed that these powers of attorney were void, and that no title was conveyed by Cobban under said powers of attorney, and as a condition to requiring the complainant to execute a conveyance to defendants determined that defendants must pay to complainant the balance of the purchase price unpaid to her by Benson (Trans., page 522, et seq.). The decree of the trial court was affirmed by this court on appeal.

In our opinion the judgment rendered by the trial court and affirmed by this court on appeal should be reversed for the following reasons:

(1) Certain jurisdictional facts were alleged and not proved;

(2) Question of delivery of Powers of Attorney is a false issue in this proceeding;

(3) Moreover, the Powers of Attorney were legally executed and delivered by complainant, and conveyances made thereunder by Cobban are binding on complainant.

JURISDICTIONAL FACTS ALLEGED, BUT NOT PROVED.

The trial court, in its decision, expressly found that there is no basis for a suspicion even that Cobban and his associates purported to defraud or consciously participated in any scheme to defraud either the United States or complainant; that they had purchased the scrip by mail in the usual course of business and were not acquainted with either Benson or Campbell, and

had no knowledge of the facts complained of by complainant (Trans., page 499).

As the allegations of fraud and conspiracy set forth in the complaint were not proved, we must consider the sufficiency of complainant's alleged cause of action as if no such allegations had been made, and so considered, the complaint would be in form an action to quiet title, and would not state a cause of action within the jurisdiction of a court of equity, because it is not alleged therein that plaintiffs are in possession of the property involved in the action, and this is a necessary allegation in a suit to quiet title in the United States courts. It follows, therefore, that proof of the allegations of fraud set forth in the complaint was necessary to sustain the jurisdiction of the court.

In answer to a similar contention, Justice Gilbert in his decision states as follows:

> "But the fraud of Benson was proven, and it was the proof of his fraud which justified the decree. Benson fraudulently procured the execution of powers of attorney in blank, and fraudulently procured the possession thereof after their execution. There is no evidence that the appellee knowingly and intentionally executed those papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did. If such had been the case, she would have no standing in a court of equity to complain of Cobban's act of inserting names and descriptions in the blanks. But the findings of the lower court, while they fall short of sustaining all

> the charges of fraud, found fraud sufficient whereon to rest the decree. It was not necessary that the defendants should have participated in Benson's fraud. It was enough that they derived their title through it. The decree, therefore, is not inconsistent with the frame and theory of the bill, and it does not rest on a ground entirely distinct from that which the bill presents."

We agree that Benson's acts may properly be considered in evidence as bearing on the question as to whether or not the powers of attorney were voluntarily executed, and delivered by plaintiff. That would be equally true if this were an action at law. But we respectfully contend that the acts of Benson, whether fraudulent or not, cannot be set forth as a cause of action, whether at law or in equity, against Cobban and his associates who had no knowledge and were admittedly not parties to the fraud. It may not be improper to set forth these acts of Benson in the bill of complaint, but unless it is shown by proper allegations and proof that defendants were parties to the fraud, the recital of these acts in the complaint would be mere matters of inducement, and not the ultimate facts, or the necessary allegations upon which the complaint is predicated.

In other words, a complaint to set aside a deed executed in the name of plaintiff by a person who purported to act under a void or voidable power of attorney is sufficient, if it alleges the ultimate facts, namely —that the said power of attorney was not executed or de-

livered by plaintiff. And it is not necessary to allege the fraudulent acts of a third person to explain these ultimate facts. Any such allegations of fraud are mere matters of inducement and do not constitute the cause of action.

We submit, therefore, that in the present case the acts of Benson, even if shown to have been fraudulent, do not justify a decree based upon fraud. At most it can only justify a decree based upon the other ground stated in the decision, namely—nondelivery of the powers of attorney, and upon this ground alone the court would not have jurisdiction in the present case for the reasons above stated. We contend therefore, that proof of the alleged fraud of Cobban and his associates was necessary to sustain the jurisdiction of the court in the present action.

DELIVERY OF POWERS OF ATTORNEY NOT AN ISSUE IN THIS PROCEEDING.

But apart from the question of jurisdiction, complainant cannot, consistently with her own claim, deny the validity of these powers of attorneys, whether Benson acted fraudulently or honestly.

Plaintiff might have consistently claimed to be still the owner of the "base lands" on the ground that the deeds to the government were not executed and delivered as her voluntary act and were therefore inoperative to convey title. But plaintiff does not claim to own the "base lands." On the contrary, she alleges that she is the owner of the "lieu lands," and commenced

this action to quiet her title thereto. She thereby affirms and recognizes the validity of the deeds to the Government, and the other papers which the Land Department considered sufficient to constitute a surrender of the "base lands," and a selection of other lands in lieu thereof, in accordance with the act of Congress authorizing the exchange of lands situated within the forest reservation for lands situated elsewhere.

It stands admitted, however, both by the allegations of the complaint above referred to, and by the complainant's own testimony that these same powers of attorney to convey, which plaintiff claims to be false and forged, and which the court found were inoperative by reason of nondelivery, had been signed by and received from plaintiff at the same time or times, under the same circumstances, and as part of the same transaction, and together with the deeds conveying the base lands to the United States, and the other papers which passed to the Government in effecting the exchange. (Trans., pages 127-135.)

It would seem, therefore, that if these powers of attorney were inoperative by reason of the fact that they were not executed and delivered as the voluntary act of plaintiff, so also the deeds to the Government are inoperative, and for the same reason. As all these instruments came into existence together, and as part of the same transaction, so must they all stand or fall together. If all these instruments are inoperative, complainant is still the owner of the "base lands," and the United States is still the owner in equity of the "lieu lands"

which were patented in reliance upon and in consideration of the deeds purporting to surrender the "base lands" to the United States. If, on the other hand, all these instruments are operative, then the "lieu lands" were lawfully patented upon the surrender of the "base lands," and were lawfully conveyed by Cobban acting under valid powers of attorney. There can be no middle ground. All these instruments were either executed and delivered, and therefore valid, or none were executed or delivered, and therefore all are invalid. In either event, plaintiff is not entitled to any relief in this action.

These observations we submit are true, whether it be considered that these instruments are absolutely void and incapable of ratification or only voidable and capable of ratification. If only voidable, they could be ratified, but not in part. It was all one transaction, and the complainant cannot ratify the part that was beneficial to her and repudiate the part that is to her disadvantage.

The trial court does not definitely determine whether or not the instruments signed by complainant were the instruments called for by the agreement. In this regard the evidence is conflicting, and the court says:

> "The truth probably is that, upon the one side, the plaintiff, not being familiar with the procedure by which base lands are exchanged for lieu lands, gave little attention to, and did not understand, such explanations as may have been made by Benson, and went away with the impression only that

> Benson was to purchase, and that she was to deed to him directly, her interest in the base lands. Upon the other hand, Benson, being advised of the conditions under which base lands could be handled and exchanged, and being familiar with the procedure, understood that the owners would execute, and, in due time, deliver such papers as were necessary to make the exchange and transfer. The plaintiff wanted to sell the lands and was interested particularly in procuring the desired price. Being concerned only with the ultimate result, she probably gave very little thought to the means by which that result would be reached. In view of the entire record, it is wholly improbable, and I am unable to conclude, that Benson agreed or that he understood, that he would directly purchase the base lands, or that deeds from the then owners were to convey the title to him personally." (Trans., pages 492, 493.)

But whether the facts are as claimed by the plaintiff, or as urged by the defense, it is evident that there was only one transaction, and it is immaterial whether the papers which plaintiff signed were only deeds, or deeds, and powers of attorney also. In either event, if complainant were not bound by the transaction, she could have repudiated all the instruments, and on the other hand, when she elected to affirm, she must have affirmed the transaction in its entirety. As these deeds and powers of attorney came into existence at the same time and as part of the same transaction, they must stand or fall together. If the transaction is ratified, the instru-

ments are all valid. If the transaction is repudiated, all are invalid.

Complainant could not have repudiated the deeds and claimed the "base lands" as against the government, and at the same time have ratified the powers of attorney so that the government could not recover the "lieu lands" from Cobban and his associates. Neither can complainant ratify the deeds and claim that the "lieu lands" were legally patented in her name, and at the same time repudiate these powers of attorney which passed at the same time so as to claim that the conveyance to Cobban and his associates is void.

In this action the trial court decided that the government was not entitled to the "lieu lands." It also decided that plaintiff was the owner of these "lieu lands" as claimed by her, and the trial court rests its decision in this respect expressly upon the ground of ratification.

In this connection, the trial court states:

> "This suit is based upon the theory that the plaintiff is entitled to the fruits of the exchange, namely, the lands patented to her by the United States in consideration of her relinquishment of title to the base lands, and therefore it may be held that by prosecuting the suit, the plaintiff has ratified all proceedings relating to such exchange." (Trans. page 501.)

However, the trial court disregards the fact that the deeds to the Government and the powers of attorney to convey came into existence together, and were signed and sent forth by plaintiff under the same circumstances

and as part of the same transaction, and that therefore they must be ratified or repudiated in entirety. In this connection the court said:

> "There is, however, no evidence to support the theory that the plaintiff ever authorized or ratified the delivery of any power of attorney to convey without the prior payment to her of the full purchase price agreed upon. Whether we accept the theory of the plaintiff or that of the defense, whether the understanding was a transfer directly to Benson of the Monache lands or an exchange thereof with the government, and thereupon a transfer of the lieu lands to Benson or such person as Benson might designate, according to all of the testimony payment of the agreed price was to precede the delivery of the instruments effecting a transfer of the title or the control of the title from the plaintiff." (Trans., page 501.)

We respectfully submit, however, that if, as stated by the court, payment of the purchase price was to precede the delivery of the instruments effecting a transfer of the title, plaintiff should not voluntarily have ratified the deeds to the government, as she must necessarily have done by claiming ownership of the "lieu lands," and that having voluntarily and with knowledge of all the facts prosecuted her claim to the "lieu lands," plaintiff thereby has ratified the entire transaction, and the validity of the powers of attorney cannot any longer be by her denied. Her remedy now is to recover the unpaid portion of the purchase price from Benson, the person with whom she dealt. It is admitted by the rec-

ord that Cobban and his associates have already paid to Benson the full purchase price of the property. (Trans., page 497.)

Moreover, it is important not to lose sight of the fact that in this action complainant is attempting to recover, not the property alleged to have been wrongfully obtained from her, but the proceeds of said property.

In any event under the facts found in this case, plaintiff would not be entitled to these proceeds—"the fruits of the exchange" as against these defendants. It may be conceded that she could have recovered against Benson, as constructive trustee, the proceeds of the property in his possession. But on the theory of a constructive trust plaintiff cannot reach beyond Benson and claim proceeds in the hands of Cobban and his associates who are not parties to the fraud of Benson, and who in good faith purchased and paid a valuable consideration for the "scrip" which constituted the complete *indicia* of ownership to the lands in controversy.

As pointed out by the trial court, Benson was not the agent of either the plaintiff, or of defendants Cobban and his associates.

> "In his transaction with Cobban he was the vender, and in his relations with plaintiff he was the vendee, or purchaser." (Trans., page 511.)

Although different in form, the transaction is in legal effect no more favorable to complainant than if Benson had been the grantee named in the deeds conveying the "base lands" and had received the same out of

escrow contrary to the agreement and had exchanged them for other lands which he had subsequently conveyed to defendant Cobban and his associates. In that case it could not be doubted that so long as Benson retained the title of the property received in exchange he would be a constructive trustee thereof for plaintiff. But, and it is important to note, that even as against Benson plaintiff's right to the property so received in exchange is only an equitable right. In this, it differs from her right to pursue and claim the original property—that is a legal right based upon the fact of non-delivery. Complainant has, however, no legal right to the property received in exchange.

Her claim to this property is not based on non-delivery of the original deeds, but on the fact that the original deeds did operate to convey her title to the original property, and that by reason thereof she is entitled to recover the proceeds. It is therefore an equitable right founded on the fact that by ratification or otherwise the original deeds were operative. Therefore, even in an action against Benson to recover the property received by him in exchange, as in the supposed case, the question of delivery of the original deeds would be a false issue.

So in the supposed case, as also in the case now under consideration, complainant's right to recover the property so received in exchange after it has passed to Cobban and his associates must necessarily be an equitable right, and in these cases also the question of delivery or non-delivery of the original deeds must necessarily be a

false issue. Neither can the fact that the alleged powers of attorney were separate from the deeds operate to the prejudice of the defendants or change the legal or equitable rights of the parties. These deeds and powers of attorney all passed together as part of the same transaction, and as the trial court expressly found, the mere formalities of the transaction are immaterial.

> "So also it is thought not to be highly important to determine whether, by the original agreement, it was contemplated that title to the base lands should be conveyed directly to Benson, as is asserted by the plaintiff, or was to be relinquished to the United States substantially in the manner testified to by Benson and Campbell. In either view, the plaintiff must have understood that, for a certain specified price, she was to alienate all of her interest in the lands, and, that being the case, the mere fact that the conveyances ran to the United States, and not to Benson, in itself furnishes no adequate ground for the interposition of a court of equity. *United States* vs. *Conklin,* 169 Fed. 177; affirmed, 177 Fed. 55. *Conklin* vs. *Benson* (Cal.), 159 Cal. 785, 116 Pac. 34." (Trans., page 499.)

Complainant, therefore, cannot rely upon non-delivery of either the deeds or the powers of attorney, but in order to recover against these defendants she must rely solely on her equities.

As above pointed out, defendants Cobban and his associates were not parties to the fraud of Benson, and they have paid to Benson the full purchase price of said

property. These defendants as bona fide purchasers are protected against these mere equities existing in favor of plaintiff because they purchased without notice, except such notice as they may be charged with by reason of the fact that these powers of attorney came into the possession of defendant Cobban with the names of the donees left blank. However, it was shown by the evidence that this was in accordance with the usual custom adopted upon the sale of "scrip," and at any rate, this does not operate to excuse complainant from the consequences of her careless acts.

It was by reason of the initial carelessness of the complainant that one of two innocent persons must now suffer. Defendants are therefore protected by the equitable principle that "wherever one of two innocent persons suffer loss on account of the wrongful act of a third, he who has enabled the third person to occasion the loss must be the person to suffer." Moreover, plaintiff cannot recover against defendants on equitable grounds without showing a superior equity. This she has not done because it stands admitted under the facts of this case that defendant Cobban and his associates are as innocent of any wrong doing as plaintiff herself, and moreover that they have already paid the full purchase price for the lands.

THE POWERS OF ATTORNEY WERE LEGALLY EXECUTED AND DELIVERED.

The trial court determined that there had been no legal delivery of the powers of attorney, and for this

reason adjudged the deeds executed by virtue of said powers of attorney to be void. On this ground also the judgment was affirmed by this court on appeal.

When we consider the painstaking manner in which the trial judge in his decision considered and weighed the evidence we are convinced that his determination of the questions involved must have great weight with this court. However, we think the trial court erred in determining that there was no valid delivery of these powers of attorney under the circumstances shown by this case, and that the court's determination of this fact is rather a conclusion from other facts than an independent finding of fact.

We are confirmed in this belief by the language of the decision itself in which it is admitted that the evidence in reference to the execution of these instruments is "very fragmentary and very unsatisfactory." (Trans., page 494.)

In this connection we quote further from the decision as follows:

> "Subsequently from time to time, but under just what circumstances or how often or when it does not appear, these papers came to Benson's hands, and they now appear to have consisted of a large number of deeds conveying the base lands to the United States, and an equal number of applications signed by the owners of the base lands for the selection of lieu lands, a like number of instruments empowering some undesignated person to make selections of lieu lands, and also an equal number conferring upon designated persons irrevocable

authority to convey the title or titles of the lieu lands to purchasers thereof." (Trans., page 495.)

Therefore, by the language of the decision it sufficiently appears that there is no evidence in the record which definitely shows that these instruments were not delivered, and as the instruments did in fact come into the possession of Benson and were by him delivered to Cobban himself, a *bona fide* purchaser, and who in reliance upon the validity of these powers of attorney executed conveyance to other *bona fide* purchasers, we think complainant should not be allowed to show a failure of delivery without the production of strong testimony in that behalf.

As the evidence shows without doubt that there was in fact a physical delivery of these papers, in our judgment the burden of proving that there was not a legal delivery is upon the complainant, and that therefore the unsatisfactory state of the testimony to which the trial judge refers is fatal to complainant's case because it is not sufficient to show non-delivery.

The following quotation from the decision will, we think, show that the trial judge based his determination that there was no delivery on the ground that complainant thought that the messenger who received the papers from her came from the office of Campbell, and that she thought Campbell was her attorney, and that he would protect her interests in accordance with the original agrement, which, according to her belief, was that the papers signed by her would be placed in escrow. In this connection the court states:

"The delivery was made either by the Notary or a subordinate in Campbell's office, but whether such delivery was the result of fraudulent collusion or only innocent inadvertance, it was not in accordance with the original agreement, and had the authorization or consent of neither Campbell nor the plaintiff. . . . In the third place, whatever may have been Campbell's authority, he did not knowingly deliver the instruments. In some unexplained manner they came into Benson's possession without Campbell's knowledge or consent. Campbell's positive disclaimer of knowledge is corroborated by the facts and circumstances of the case. . . . Whether Benson procured the papers by deception or through the inadvertence of the clerks in Campbell's office, his acceptance and use of them constituted a fraud upon the plaintiff's rights. There was no legal delivery of the instruments either by the plaintiff or by her agent." (Trans., pages 502, 516, 517.)

In this connection, also, it is important to notice that the trial court determined that Campbell never saw these powers of attorney, or in fact knew that they were to be executed; also that it was not Campbell's understanding of the original agreement that the papers which complainant executed were to be delivered in escrow; and also that Campbell did not understand that he was acting as complainant's attorney. (Trans., pages 493, 502, 513.)

It appears, therefore, from the facts found and relied upon by the trial judge that complainant's complete claim of non-execution and non-delivery of these in-

struments rests upon her own negligence and careless acts.

According to her own testimony complainant signed a great number of papers which she thought were deeds to Benson but which in fact were deeds to the Government of the United States, and did not purport to be deeds to Benson, and the name of Benson did not appear in any one of them. According to her own testimony also she handed these instruments so signed by her to a messenger without any instructions, believing that they would find their way to the proper depositary, and that her interests would be protected. These instruments were in fact delivered into the possession of the beneficiary—by whom, at what time, or in what manner it does not appear, but—presumably by the messenger, and there is nothing to show that the messenger acted contrary to his instructions. In this case, therefore, complainant by her own careless acts did in fact execute and did in fact deliver the papers handed to her, by the messenger, and for that reason this is not a case where the law in reference to a delivery in escrow has any application whatever.

The trial court impliedly decides that complainant cannot rely upon her own careless acts to defeat her own signature, but nevertheless fails to observe that for the same reason she cannot rely on her own careless acts to defeat her own delivery. In this connection the decision reads as follows:

> "It is true, I think, that when she signed the large number of documents sent to her from Campbell's office, the plaintiff acted without fully understanding their legal import, but even if it be held that having voluntarily attached her signature she is chargeable with an understanding of their meaning and legal effect, it still remains true that neither expressly, nor impliedly, did she authorize their delivery to Benson." (Trans., page 502.)

But we respectfully contend that unless a mere secret, unexpressed intention of a grantor can defeat delivery of an instrument, there was a delivery in this case. Complainant says she thought the instruments brought to her by a messenger were deeds to Benson which the messenger delivered to Campbell to be placed in escrow in accordance with her understanding of the agreement. She did not take the precaution either to examine the instruments or to inquire or direct to whom they would be delivered by the messenger. After the instruments had passed into the hands of innocent third persons she discovers that these instruments which she signed were not the deeds which she had supposed them to be, also that the messenger did not deliver them, as she supposed he would do, to Campbell, whom she supposed was her attorney, and whom she further supposed would protect her interests.

But if the facts show, (and the facts do so show) that complainant was so careless as not to read what she was signing, she will nevertheless be bound by her signature as her voluntary act, notwithstanding the fact that

she did not know the contents of the instruments, and even although she supposed them to be something different. This has been effectively decided by the Supreme Court of this State in another branch of this same litigation, in which complainant was a party—*Conklin* v. *Benson,* (above cited).

So also, and for the same reason, if the facts show, (and they do so show) that the complainant was so careless as to deliver possession of the written instruments signed by her without directing to whom they were to be delivered, she will be bound by the delivery of these instruments to the beneficiary, even although she supposd that they were not to be so delivered. Her carelessness in both these respects is shown by her own testimony, and completely overthrows her mere legal conclusion that the instruments were not executed and delivered.

Under the facts in this case it is undoubtedly true that the surrender of the papers signed by her was as voluntary and as much in disregard of the consequences, as was her act of signing without knowledge of their contents. Indeed, if there is any reason why these instruments should not be legally operative against complainant and in favor of innocent persons, it is rather because she signed without sufficient knowledge, than that her delivery was without sufficient consent, because from her own testimony we think it fair to conclude that she was in fact willing to deliver these papers to Benson, the beneficiary. This appears by her testimony as follows:

"Q. Now Mrs. Conklin, who was to place the deeds to the Monache lands in escrow under the agreement had at the office of Campbell at the meeting in August or September?

"A. I supposed Campbell and Benson.

"Q. Was anything said—did you understand at that time that Mr. Benson was to place these deeds in escrow?

"A. Yes." (Trans., pages 139 and 140.)

Under these circumstances surely complainant should not be allowed to show that there was not a valid delivery of these instruments.

Although it is undoubtedly true that knowledge of the contents of an instrument as well as consent to its delivery, are essential to the due execution of any writing, nevertheless, in this case, as in *Conklin* v. *Benson,* (above cited), careless disregard of the contents of the instrument is equivalent to knowledge as a matter of law; and for the same reason, also, the careless disregard in this case as to the disposition of the instruments is equally as a matter of law equivalent to consent to delivery. The decision in this case as it now stands, therefore, cannot be reconciled with the decision in *Conklin* v. *Benson* as the trial judge in his decision attempted to do.

In our opinion the facts in the case now under consideration show both a careless execution and a careless delivery, but an execution and delivery nevertheless binding upon complainant in favor of innocent third persons. In the above quoted portion of the opinion

of this court upon this appeal it is declared that if complainant had knowingly and intentionally executed these papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did, she would have no standing in a court of equity to complain of Cobban's act of inserting names and descriptions in the blanks. We contend that such is the law and we also earnestly contend that the facts in this case show that complainant signed and delivered possession of these papers without regard to the consequences, and so carelessly as to constitute knowledge and intent in law, and to preclude her from any relief in a court of equity against these defendants, who should not be made to suffer by reason of these very acts of carelessness.

Respectfully submitted,

CUSHING & CUSHING,
WM. S. McKNIGHT,
Attorneys at Law, *Amici Curiæ.*

I, Charles S. Cushing, one of the above-named attorneys at law, amici curiae, hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

CHARLES S. CUSHING.